(1)

No. 91-5118-CSY
Status: GRANTED
CAPITAL CASE

Title: Derrick Morgan, Petitioner
v.
Illinois

Docketed:
July 1, 1991

Court: Supreme Court of Illinois

Counsel for petitioner: Schiedel,Charles M.

Counsel for respondent: Burris,Roland W., Czech,Marie Quinlivan

Entry	Date	Note	Proceedings and Orders
1	Jul 1 1991	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Aug 5 1991		Order extending time to file response to petition until August 30, 1991.
5	Aug 30 1991		Brief of respondent Illinois in opposition filed.
6	Sep 5 1991		DISTRIBUTED. September 30, 1991
8	Oct 7 1991		REDISTRIBUTED. October 11, 1991
10	Oct 15 1991		Petition GRANTED.
			**********
11	Nov 5 1991		Record filed.
		*	Original record Illinois Supreme Court, 2 Volumes (1 Box)
12	Nov 20 1991		SET FOR ARGUMENT TUESDAY, JANUARY 21, 1992. (4TH CASE)
18	Nov 26 1991		Brief amicus curiae of Natl. Assn. of Criminal Defense Lawyers filed.
13	Nov 27 1991		Brief amici curiae of ACLU, et al. filed.
14	Nov 27 1991		Lodging received from National Association of Criminal Defense Lawyers as Amicus Curiae.
16	Dec 3 1991		Brief of petitioner Derrick Morgan filed.
17	Dec 3 1991		Joint appendix filed.
15	Dec 5 1991		CIRCULATED.
19	Dec 30 1991	X	Brief of respondent Illinois filed.
20	Jan 10 1992	X	Reply brief of petitioner Derrick Morgan filed.
21	Jan 21 1992		Argued

91-5118

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

DERRICK MORGAN, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF ILLINOIS

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QUESTION PRESENTED FOR REVIEW

Can a state prohibit inquiry to reveal whether a potential juror will automatically impose death if the defendant is convicted of murder?

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TO THE SUPREME COURT OF ILLINOIS

The petitioner, DERRICK MORGAN, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois, entered on February 22, 1991.

OPINION BELOW

The opinion of the Supreme Court of Illinois appears at 142 Ill.2d 410, 568 N.E.2d 755 (1991). It is attached as Appendix A to this petition.

JURISDICTION

The judgment of the Supreme Court of Illinois, affirming the petitioner's conviction and sentence was entered on February 22, 1991. A petition for rehearing was filed on March 15, 1991. The petition for rehearing was denied on April 1, 1991. The order denying the petition for rehearing is attached as Appendix B to this petition. This petition is being filed within 90 days of the denial of the petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOKED

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury....

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner, DERRICK MORGAN, was convicted by a jury of murder. The same jury sentenced petitioner to death.

Among the arguments advanced on direct appeal to the Illinois Supreme Court was that the trial court had improperly refused to ask potential jurors whether they would automatically impose the death penalty if they found petitioner guilty of murder. It was alleged that that decision violated his right to an impartial jury guaranteed by the Sixth and Fourteenth Amendments. The Illinois Supreme Court rejected the merits of that argument and all of the other issues raised, and affirmed petitioner's conviction and sentence.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER A STATE CAN PROHIBIT INQUIRY TO REVEAL WHETHER A POTENTIAL JUROR WILL AUTOMATICALLY IMPOSE DEATH IF THE DEFENDANT IS CONVICTED OF MURDER.

Prior to the selection of the jury, the defendant requested that the trial court ask the members of the venire whether they would automatically impose the death penalty if they convicted the defendant of murder. The trial court refused that request, although it asked all members of the venire whether they would be unable to impose death.

This Court recognized more than 70 years ago that jurors who would automatically impose the death penalty upon a defendant convicted of murder should not serve on a sentencing jury. Stroud v. United States, 251 U.S. 15, 64 L.Ed. 103, 111 (1919). That principle was recently reaffirmed in Ross v. Oklahoma, 487 U.S. 81, 101 L.Ed.2d 80, 88, 108 S.Ct 2273 (1988). Many other courts have explicitly recognized that such jurors should not serve on sentencing juries. Bracewell v. State, 506 So.2d 354 (Ala.Cr.App. 1986); Pickens v. State, 292 Ark. 362, 730 S.W.2d 230 (1987); People v. Coleman, 46 Cal.3d 749, 759 P.2d 1260 (1988); Sims v. United States, 405 F.2d 1381 (D.C. Cir. 1968); Poole v. State 194 So.2d 903 (Fla. 1967); Skipper v. State, 267 Ga. 802, 364 S.E.2d 835 (1988); Stanford v. Commonwealth, 734 S.W.2d 781 (Ky. 1987); State v. Henry, 196 La. 217, 198 So. 910 (1940); Hunt v. State, 321 Md. 387, 583 A.2d 218 (1990); State v. McMillen, 783 S.W.2d 82 (Mo. banc 1990); Thompson v. State, 721 P.2d 1290 (Nev. 1986); State v.

Williams, 113 N.J. 393, 550 A.2d 1172 (1988); State v. Rogers, 341 S.E.2d 713 (N.C. 1986); State v. Lawrence, 44 Ohio St.3d 24, 541 N.E.2d 451 (Ohio 1985); Ross v. State, 717 P.2d 117 (Okl.Cr. 1986); State v. Wagner, 305 Or. 115, 752 P.2d 1136 (1988); Commonwealth v. White, 531 A.2d 806 (Pa. super. 1987); Cumbo v. State, 670 S.W.2d 251 (Tex. Crim. App. 1988); State v. Norton, 675 P.2d 577 (Ut. 1983); Patterson v. Commonwealth, 283 S.E.2d 212 (Va. 1981); State v. Hughes, 106 Wash.2d 176, 721 P.2d 902 (1986); Crawford v. Bounds, 395 F.2d 297 (4th Cir. 1968). Many of those jurisdictions recognized, as did this Court in Ross, that a juror who would automatically impose death has views that would prevent or substantially impair the performance of his duties as a juror. Wainwright v. Witt, 469 U.S. 412, 424, 83 L.Ed.2d 841, 105 S.Ct. 844 (1985).

It is unclear whether Illinois recognizes that such jurors should not serve on a capital sentencing jury. The Illinois Supreme Court did not address that issue in this case, merely stating that it had already held that there was no requirement that the trial court ask jurors whether they believe that the death penalty should be imposed in every murder case. People v. Morgan, slip op. at 33. The Illinois Supreme Court certainly has never reversed a case because such a juror served. And even if Illinois recognizes that such jurors should not serve on capital sentencing juries, Illinois, because of the ruling in this case, provides no means to prevent their service.

The Illinois Supreme Court also held that petitioner could not prevail on appeal because no "juror on the defendant's jury was actually shown to be impartial [sic]." (emphasis in original) People v. Morgan, slip op. at 33. Apparently the court meant to say that the defendant had not shown that any juror was biased. The court lifted that requirement from Ross v. Oklahoma, 481 U.S. at 91.

Because an Illinois defendant cannot ask jurors whether they would automatically impose the death penalty yet must show that such a juror sat on his jury in order to prevail on appeal, a defendant in Illinois absolutely cannot obtain relief if an unfit juror sentences him to death. Because he cannot ask potential jurors whether they would automatically impose the death penalty, the appellate record will never be sufficient to establish that such a juror condemned the defendant to death.

This limitation on a defendant's voir dire is particularly unfair given that in this case the State was allowed to "Witherspoon" jurors and excuse them for cause if the jurors felt they could not impose the death penalty. Indeed, the Illinois Supreme Court has held that the State has a right to excuse jurors under Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770 (1968). Daley v. Hett, 113 Ill.2d 75, 495 N.E.2d 513, 516 (1986). The Illinois Supreme Court has transformed Witherspoon, a substantive limitation on the powers of the State, into a right for the State, while denying the reciprocal right to the defense. It

is ironic that in Illinois the decision in Witherspoon has become detrimental to defendants.

In contrast to the condition of the law in Illinois, many states have explicitly held that defendants eligible for the death penalty have a right to ask potential jurors if they would automatically impose the death penalty. Bracewell v. State, 506 So.2d 354 (Ala. Crim. App. 1986); Sims v. United States, 405 F.2d 1381 (D.C. Cir. 1986); Poole v. State, 194 So.2d 903 (Fla. 1967); Skipper v. State, 257 Ga. 802, 364 S.E.2d 835 (1988); Stanford v. Commonwealth, 734 S.W.2d 781 (Ky. 1987); State v. Henry, 196 La. 217, 198 So. 910 (1940); State v. McMillen, 783 S.W.2d 82 (Mo. banc 1990); State v. Williams, 113 N.J. 393, 550 A.2d 1172 (1988); Commonwealth v. White, 531 A.2d 806 (Pa. super 1987); State v. Norton, 675 P.2d 577 (Ut. 1983); Patterson v. Commonwealth, 283 S.E.2d 212 (Va. 1981). Some states allow the defense to ask jurors whether they could impose the full range of sentences even in non-capital cases. Sanders v. State, 626 S.W.2d 366 (Ark. 1982); Martin v. State, 780 S W.2d 497 (Tex. App. - Corpus Christi 1989); State v. McFarland, 332 S.E.2d 217 (W. Va. 1985). Two states other than Illinois have held that a defendant is not entitled to ask jurors whether they would automatically impose the death penalty. Riley v. State, 585 A.2d 719 (Del. 1990); State v. Hyman, 281 S.E.2d 209 (S.C. 1981). Yet it is apparent from the discussions in some cases that even in South Carolina defendants are allowed to ask jurors whether they would automatically impose the death

penalty. See Gaskins v. McKellar, 916 F.2d 941, 949 (4th Cir. 1990).

Recently, Senator Strom Thurmond said that the 79% of the American public who favored the death penalty in murder cases "must not be ignored." Chicago Tribune, June 26, 1991, Sec. 1, p. 6. This decision by the Illinois Supreme Court ignores the reality that many Americans so strongly favor the death penalty that they will impose it for every murder conviction. This court should grant this petition to ensure that those jurors do not serve on capital sentencing juries in the State of Illinois, or in any other state.

CONCLUSION

For the foregoing reasons, DERRICK MORGAN, petitioner, respectfully asks that a writ of certiorari be issued to the Supreme Court of Illinois.

Respectfully submitted,

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APPENDIX A

Docket No. 67692—Agenda 4—November 1990.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. DERRICK MORGAN, Appellant.

JUSTICE MORAN delivered the opinion of the court:

The defendant, Derrick Morgan, was indicted along with Milbon Lockridge (a.k.a. Poncho) and Sam Green (a.k.a. B-Bop) by a Cook County grand jury on two counts of murder and one count of armed violence for the shooting death of David "Swift" Smith (Smith). The armed violence charge against the defendant was later dismissed. After a jury trial, defendant was found guilty of murder. The jury subsequently found him eligible for the death penalty and sentenced him to death. Defendant appeals directly to this court (107 Ill. 2d R. 603).

Concerning pretrial proceedings, the defendant raises as issues whether: (1) a *Batson* violation occurred; and (2) the trial court erred by excusing potential jurors who expressed reservations about the death penalty and by refusing defendant's request to further question a juror about whether his attackers in a beating had been African-American.

Pertaining to the guilt phase of his trial, the defendant raises as issues whether: (1) he was proven guilty beyond a reasonable doubt; (2) the trial court erred by granting the State's motion *in limine* so that he could not present evidence that another person had committed the crime; (3) the trial court erred by allowing two defense witnesses to refuse to testify on the grounds of the fifth amendment; (4) the trial court properly informed two defense witnesses of the consequences of testifying on his behalf; (5) the trial court erred in advising some witnesses of the consequences of perjury, and in not advising others; (6) actions and comments by the trial judge denied him a fair trial; (7) he was denied his sixth amendment right to confront and cross-examine witnesses when the State elicited hearsay testimony that Smith told his girlfriend that if anything happened to him, he would be with the defendant; (8) his rights of confrontation were violated when a police officer testified that he spoke with Milbon Lockridge, a convicted accomplice who did not testify about the murder, which led to the officer's investigation of him; (9) he was denied the opportunity to present a defense when his alibi witness was stricken because she was allegedly not disclosed as an "alibi witness"; (10) the trial court erred when it struck all of his alibi witness' testimony and, if it did, whether it erred in striking all of it when some of it did not pertain to the alibi; (11) reversible error was committed in the State's closing argument; (12) the trial court erred in refusing to allow him to call a police officer as a witness for the purpose of impeaching the officer with his own police report; (13) the trial court erred in refusing to grant a hearing on his oral motion to suppress an in-court identification; and (14) the trial court further made errors in admitting certain evidence and not admitting other evidence, and by sustaining objections to his closing argument.

The defendant also raises as issues pertaining to his sentencing hearing whether: (1) he was eligible for the death penalty; (2) his eighth amendment right to a fair sentencing hearing was denied when Smith's girlfriend was allowed to state that she was pregnant when he was killed, and when a photo of Smith and his child were admitted into evidence; (3) the State misstated the law and the evidence at the first stage of sentencing, thus denying defendant a fair sentencing hearing; (4) he was denied a fair sentencing hearing at the second stage when he was not allowed to show that a third party had recently threatened Smith, and that the third party had the opportunity to convince key witnesses to falsely implicate the defendant; (5) the trial judge denied him a fair sentencing when he made several statements during *voir dire* that the jurors were not responsible for imposing the death penalty; (6) he had a right of allocution; (7) he was denied a fair sentencing when the State was not limited to one closing argument at sentencing; (8) he was denied an impartial jury when the judge refused to ask jurors whether, if they found him guilty, they would automatically impose the death penalty; (9) he was denied a fair sentencing when the jury was told to disregard sympathy; and (10) he was denied a fair sentencing when evidence of charged, but unconvicted, crimes was admitted.

The defendant also raises issues as to the constitutionality of the death penalty statute, as well as to whether the trial court erred in denying his *pro se*, post-trial motion alleging ineffective assistance of counsel.

On December 17, 1985, at about 9:15 p.m., police officers responded to a radio dispatch regarding a shooting. Chicago police officer Thomas Kampenga testified as follows: that he and his partner, Officer Robert Skahill, found the victim, David Smith, lying in a pool of blood; that he

noticed several gunshot wounds to Smith's head; and that he saw a clear plastic bag containing a white powder lying next to the body. Both Officers Kampenga and Skahill testified that they had earlier seen the defendant and Smith exit the building where Smith lived, enter a grocery store across the street, and leave the store a short time later. Officer Skahill said that, as he was interviewing people around the building where Smith lived, he only noticed Smith leave the building, with the defendant following him. Officer Kampenga further stated that since he knew where Smith lived, he and his partner went to his apartment and informed his live-in girlfriend that he had been killed; she told them that Smith may have been with the defendant; and their subsequent search for the defendant was not successful.

Lashone Joyner testified as follows: that she was Smith's girlfriend and they lived together; that on December 17, 1985, at 4 p.m., she was home alone cooking when two men whom she knew only as "B-Bop" and "Poncho" visited; that she had known the men since 1975 from visiting their disco at the El Rukn Temple; that the men asked if Smith was home, and she told them he was not; that later that evening Smith came home, and then went out again; that at about 8 or 8:30 Smith came home alone, but then let the defendant (whom she knew only as "Tate") in; that she had known defendant for seven or eight years, and that he and Smith were friends; that she overheard defendant tell Smith that he had something for them to do; and that, as he left the apartment, Smith told her that "if anything happen [*sic*] to him, he would be with [defendant]."

Dr. Eupil Choi, an assistant Cook County medical examiner, testified that Smith was killed from multiple gunshot wounds to the head, and that he found six bullets in Smith's head.

Peter Poole, a forensic chemist then employed by the Chicago police department, testified as follows: that he performed a series of tests on the bag of white powder found next to Smith's body; that based on those tests, he determined that the powder did not contain any controlled substance or common adulterants; and that the substance appeared to have the color and consistency of flour.

Chicago police detective John Robertson testified as follows: that four months after Smith's murder, he was working on an unrelated case and he had become quite familiar

with the El Rukn street gang; that as part of that investigation he spoke with Milbon Lockridge (nicknamed "Poncho"); that Lockridge told an assistant State's Attorney (as well as a grand jury), in his presence, about defendant's involvement in Smith's murder; that he then secured a warrant for defendant's arrest; that he later learned that defendant was in custody in LaPorte County, Indiana; and that he visited defendant in the LaPorte County jail, where he was being held under the alias "Larry Tate" and informed him of the arrest warrant. Officer Robertson also stated that he later learned that the defendant had confessed to an inmate, Stephen William Benjamin (Benjamin), at the LaPorte County jail. Robertson further testified that he went to the prison with a photo array, and Benjamin identified the defendant as the person who confessed to the murder.

Benjamin testified that he was in the LaPorte County jail in May 1986, serving a 115-day sentence for driving while intoxicated. He said that on a Saturday evening in mid-May, he had a conversation with the defendant, whom he then knew as "Larry Tate." According to Benjamin, the defendant told him: that there was a "hold" on him from Chicago for a murder that he and two other El Rukn gang members, B-Bop and Poncho, had committed; that he had been paid by "a big dope dealer" $2,000 before and $2,000 after he murdered a man that defendant called "Swift"; that on the night of the murder, he had placed a bag of flour in an abandoned apartment, and then went to Swift's house to pick him up; that he wanted Swift to believe that the bag contained cocaine; that when he picked Swift up, he told him that he had some cocaine for them to pick up; that he and Swift then walked to the abandoned apartment; that in the meantime, B-Bop was at the apartment to make sure that "the hit went down," and either B-Bop or Poncho was in the the getaway car; and that as Swift finished tasting the flour, defendant pulled out a .357 and shot Swift five or six times in the head.

Benjamin also testified that the defendant told him that he was going to attempt to escape from the LaPorte County jail during a trip to the dentist office by killing the guards. He said that defendant told him that B-Bop would meet him and that they would go back to Chicago to "take care of all of the witnesses." Shortly after Benjamin had this conversation, he told a jail guard the substance of his conversation with the defendant, and was transferred to

another cell block in the prison. He further testified that he was not promised anything in exchange for his testimony, as he was scheduled to get out of the LaPorte County jail in June 1986 anyway.

Constance Smith, the victim's sister, testified to the following: that she was at the victim's apartment at 7:50 p.m. on the night that he was murdered; that she stayed at the apartment for approximately 20 minutes; and that she knew the defendant and did not see him at the apartment during that time period. Defendant's girlfriend, Barbara Baker, testified that defendant was at her house on the night of the murder.

Sergeant Clayton Jordan of LaPorte County testified that according to his records, Benjamin was housed in Cell Block 5 South of the county jail, while, at the same time, defendant was housed in Cell Block 5 South Central. He also said that inmates were not allowed to mingle with inmates from other cell blocks.

Following closing arguments, and a short deliberation, the jury found defendant guilty of murder. At the first phase of defendant's sentencing hearing, the only evidence presented was a certified copy of defendant's birth certificate, establishing that he was at least 18 years of age at the time the crime was committed. The State argued that the only issue at this phase of sentencing was the defendant's age, as the jury, by the nature of its verdict, had already determined that it was a "contract murder." Following deliberations, the jury found the defendant eligible for death penalty. At the second stage of the sentencing hearing, after the State presented evidence of defendant's prior convictions, and defendant presented mitigating evidence (including the testimony of a psychologist who said defendant had rehabilitative potential but an antisocial personality), the jury sentenced defendant to death.

PRETRIAL ISSUES

The first issue that defendant raises is whether or not a *Batson* violation occurred. During *voir dire*, the defense moved for a mistrial because the State had used peremptory challenges to excuse two of three potential African-American jurors who had been questioned. The trial court ruled that the defendant had established a *prima facie* case of racial discrimination under *Batson* v. *Kentucky* (1986), 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712.

The prosecutor explained that he excused potential juror Pearline McGee because of a "hunch" he had about her. He said that he guessed from the way that she answered the court's questions about her previous jury service that she had reached a verdict of "not guilty" in that trial. He also stated that McGee worked at the post office, and that he "had bad luck with post office employees being on juries."

Regarding potential juror Peter Reeves, the prosecutor stated that he excluded him because he was unemployed, and had been a resident at his current address for only five years, thus not having sufficient ties to the community. The prosecutor also said that Reeves failed to fill out his juror card completely. After hearing these explanations, the trial court held that the prosecutor did not arbitrarily exclude African-American potential jurors.

The question has been properly placed before this court, as the defendant objected to the potential jurors' exclusion at trial and in his post-trial motion for a new trial. The State argues that the trial court improperly concluded that defendant had established a *prima facie* case of discrimination. This court has held that "the initial determination of whether a *prima facie* case has been established is left to the judgment of the trial judge, who is in a superior position to determine whether the prosecutor's exercise of peremptory challenges was motivated by group bias." (*People* v. *Evans* (1988), 125 Ill. 2d 50, 66-67.) Based on this court's extensive review of the record, no reason can be found not to defer to the trial court's judgment that a *prima facie* case had been established.

The issue then narrows down to whether or not the trial court erred in accepting the prosecutor's explanations for the peremptory challenges. The explanations the State gives must be "clear, reasonably specific, legitimate, and nonracial in order to dispel the presumption created by the *prima facie* case," and this court will usually give great deference to the trial court's findings. (*People* v. *Hope* (1990), 137 Ill. 2d 430, 467.) The trial court was clearly correct in determining that the prosecutor dismissed potential jurors McGee and Reeves for legitimate, nonracial reasons.

The prosecutor's explanation that he dismissed prospective juror McGee on the basis of her demeanor is sufficient. (See *People* v. *Young* (1989), 128 Ill. 2d 1, 20-21 (where the court found that a prosecutor's explanation, that he challenged a prospective juror because of his demeanor, was sufficient to rebut a *prima facie* violation of *Batson*).) The

prosecutor's main problem with McGee was her demeanor in discussing a prior time when she served on a jury. Additionally, a close reading of the record shows that the prosecutor's remarks concerning McGee's employment were meant as an afterthought and, thus, are of no consequence.

As to potential juror Reeves, the prosecutor's remarks, that he was concerned with his lack of ties to the community, is sufficient to rebut defendant's *prima facie* showing of a *Batson* violation. Unless the decision is against the manifest weight of the evidence, the question of whether or not the prosecutor was credible in offering his reasons is a question best left to the trial judge, who is in the best position to determine credibility. (*Hope*, 137 Ill. 2d at 467.) After reviewing the record, we find that the defendant did not meet his burden of showing that the trial court abused its discretion.

The defendant also argues that the trial court erred by excusing potential jurors who expressed reservations about capital punishment, and by refusing to further question a juror as to whether his attackers in a beating had been African-American. With the entire venire seated in the courtroom, the trial court asked that potential jurors who had reservations about the death penalty raise their hands. The trial judge then specifically questioned each of these potential jurors regarding their views and decided whether to dismiss them.

One of the potential jurors stated that he did not believe in capital punishment and would have great difficulty in voting for the death penalty. Then, the following colloquy between the trial judge and the potential juror took place:

> "PROSPECTIVE JUROR: Five years ago, I was a juror, and the same question [*sic*]. When I was examined whether I would be a proper juror, I was dismissed because the attorney felt I would not be qualified.
>
> THE COURT: Under the circumstances you feel you could not be fair and impartial because the death penalty may be imposed?
>
> PROSPECTIVE JUROR: I don't think I would be fair."

Over defense counsel objections, the trial judge excused this prospective juror.

A second potential juror stated that she did not believe that she could vote for the death penalty. When the trial judge asked her if she would automatically vote against the death penalty, she stated that she would, as a moral statement. Over defense counsel's objections, this potential juror was also excused.

> "*Witherspoon v. Illinois* (1968), 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770, prohibits the exclusion for cause of prospective jurors who express only general objections to the death penalty. In *Wainwright v. Witt* (1985), 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52, 105 S. Ct. 844, 852, the Court held that a juror may not be excused unless his or her views ' "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." ' " (*People v. Gacho* (1988), 122 Ill. 2d 221, 239.)

The trial court is in the best position to determine whether a prospective juror will be fair. As such, "deference must be paid to the trial judge who sees and hears the juror." *Wainwright v. Witt* (1985), 469 U.S. 412, 426, 83 L. Ed. 2d 841, 853, 105 S. Ct. 844, 853.

In the case of the first prospective juror, the trial court had ample reason to conclude that he would not fairly weigh the evidence as a consequence of his views of the death penalty. His response is similar to that of prospective jurors in other cases who have been found to have been properly dismissed. See, *e.g.*, *People v. Gacho*, 122 Ill. 2d at 238-40 (when asked whether he would consider imposition of the death penalty, the prospective juror replied: "No, I would rather not"); *People v. Del Vecchio* (1985), 105 Ill. 2d 414, 431 (when asked whether he could impose the death penalty, the prospective juror stated: "I don't think I have a right to do that").

As to whether the trial court should have further questioned the second potential juror, prior to dismissing her, the issue has been waived, as defendant failed to raise it in his post-trial motion for a new trial. "*Both* a trial objection *and* a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial." (Emphasis in original.) *People v. Enoch* (1988), 122 Ill. 2d 176, 186.

Defendant also raises issues regarding the *voir dire* of juror Mark Armgardt. Armgardt said that he had been the victim of a beating five years earlier. The trial court refused defendant's request to ask him whether or not his assailant had been African-American. Defendant argued that because Armgardt may have been the victim of an interracial crime, he may be inclined to impose the death against an African-American defendant. Defendant raised

his objection at trial, but failed to raise it in his post-trial motion for a new trial. Thus, on appellate review, as the issue does not rise to the level of plain error (107 Ill. 2d R. 615(a)), it is waived. *Enoch*, 122 Ill. 2d at 186.

TRIAL.

As to errors committed during the trial, the defendant initially argues that the State failed to find him guilty beyond a reasonable doubt. In support of this contention he argues that because there is no physical evidence linking him to the crime, and because his alleged confession to Benjamin never took place, there was not enough evidence to convict him beyond a reasonable doubt.

> "A criminal conviction will not be set aside on review unless the evidence is so improbable or unsatisfactory that there remains a reasonable doubt of the defendant's guilt. [Citations.] It is not our function to retry a defendant when considering a challenge to the sufficiency of the evidence of his guilt. [Citations.] Rather, determinations of the credibility of witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence are responsibilities of the trier of fact." (*People v. Jimerson* (1989), 127 Ill. 2d 12, 43.)

Upon review, once a defendant is found guilty of a crime, all of the evidence is to be considered in a light most favorable to the prosecution. *People v. Collins* (1985), 106 Ill. 2d 237, 261, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 61 L. Ed. 2d 560, 573, 99 S. Ct. 2781, 2789.

Applying the aforementioned principles to the instant case, we conclude that there was sufficient evidence to support the jury's verdict. Here, the essential issue is the credibility of Benjamin's testimony concerning defendant's admissions. Defendant argues: that it is unlikely that he (a member of Chicago's El Rukn street gang) would have confessed to Benjamin (an Indiana native who was serving a short sentence for driving while intoxicated); that the physical evidence shows that the bullets remained in the victim's head, and if defendant had used a .357-caliber gun (as Benjamin testified that he did), then the bullets would have gone through Smith's head; that there was no evidence, other than Benjamin's testimony, of a contract; and that there were other inconsistencies in Benjamin's testimony.

The jury was exposed to all of the potential infirmities in Benjamin's testimony that defendant presents. The determination of credibility of witnesses and evidence is exclusively within the province of the jury, and the jury will resolve any conflicts. (*Collins*, 106 Ill. 2d at 261-62.) As the jury was made fully aware of the infirmities of Benjamin's testimony and other circumstantial evidence pointing towards the defendant's guilt, we cannot say that its conclusions were unreasonable. Therefore, he was properly found guilty beyond a reasonable doubt.

The defendant next argues that he was denied a fair trial when the trial court granted the State's motion *in limine* which excluded any evidence that Elbert Dunnigan (a third party) had threatened Smith prior to the murder, and that he had the opportunity to convince Benjamin to lie and implicate the defendant in the murder. As an offer of proof, the defendant stated that Elbert Dunnigan had threatened Smith with a handgun one week prior to the murder, and that he, having been housed in the LaPorte County jail at the same time as Benjamin, had persuaded Benjamin to falsely implicate the defendant. The trial court then granted the State's motion *in limine*.

The trial court sustained the State's relevance objections when defendant asked Sergeant Clayton Jordan, head of security for the LaPorte County jail, whether Benjamin and Dunnigan had been housed together in (or were even in the same cell block of) the jail. The trial judge also did not allow the testimony of Frank Brown. In an offer of proof, the defendant told the court: that Mr. Brown had known the defendant, Smith, and Dunnigan for a number of years; that Brown had seen Dunnigan threaten Smith in the past; and that while Brown was in the LaPorte County jail, Dunnigan had twice asked him to claim that the defendant had admitted to committing Smith's murder. The trial court also did not allow the defendant to call two witnesses who claimed to have seen Dunnigan threaten Smith.

The defendant's reliance on Brown's proffered testimony is misplaced because none of it was ever going to be introduced at trial because Brown invoked his fifth amendment right to refuse to testify based on the possibility of self-incrimination. Thus, the defendant's theory that Dunnigan had committed the murder is based solely on the testimony of one witness who would testify that she saw Dunnigan threaten Smith one week prior to the murder. The only other evidence implicating Dunnigan in Smith's murder would have been the testimony of a jail guard as to the location of Dunnigan's cell at the LaPorte County jail.

"An accused *** may attempt to prove that someone else committed the crime with which he is charged [citation], but this right is not without limitations." (*People v. Ward* (1984), 101 Ill. 2d 443, 455.) This court has long observed:

> "One accused of crime may prove any fact or circumstance tending to show that the crime was committed by another person than himself. [Citations.] It is, of course, difficult, in dealing with evidence of this character, to define the precise limits which must control its admission. If it is too remote in time to throw light on the fact to be found it should be excluded." (*People v. Nitti* (1924), 312 Ill. 73, 90.)

This court has also found that evidence should be excluded if it is too speculative. *People v. Dukett* (1974), 56 Ill. 2d 432, 450.

Defendant argues that under *Nitti*, evidence that Dunnigan had threatened Smith one week prior to the murder is highly relevant. The excluded evidence in *Nitti* showed that two weeks before his death, the victim had an argument with his son, when the victim refused to give him $500. The son had kicked and beat the victim until he was nearly unconscious. The evidence showed that the son then disappeared and did not reappear until a week later. The court found that this evidence was not too remote to be relevant. *Nitti*, 312 Ill. at 90.

However, in the instant case, there is far less evidence that links Dunnigan to the murder. The evidence that Dunnigan had threatened Smith shows a remotely speculative relationship, at best.

The testimony of Sergeant Jordan as to which cell block Dunnigan was in at the LaPorte County jail was also properly excluded. The fact that Dunnigan may have been incarcerated in the same cell block as Benjamin does not show that he persuaded (or even talked to) him about falsely implicating the defendant in Smith's murder. No other evidence linking Benjamin and Dunnigan had been offered. As earlier stated, speculative evidence may be properly excluded at the discretion of the trial judge, and this evidence was speculative at best.

The defendant next contends that the trial court erred when it allowed two defense witnesses to refuse to testify for fear of self-incrimination, without determining whether the witnesses could have provided certain limited testimony without incriminating themselves.

Prior to trial, the State made a motion *in limine* to

preclude Henry Evans from testifying. The trial court reserved judgment on the matter. At trial, the defendant informed the court that Evans had criminal charges pending against him in Cook County and that, according to him, an unknown representative of the State's Attorney's office had threatened him regarding his charges if he testified on behalf of the defendant. The defendant did not make an offer of proof as to what Evans would testify to, but he alluded that it would be to the aforementioned threats. The trial judge then called in Evans and his attorney. The judge examined Evans, and he then invoked his fifth amendment right not to testify based on the possibility of self-incrimination.

Defendant then attempted to call Frank Brown. After finding out that there were criminal charges pending against Brown in Cook County, and a warrant had been lodged against him in Indiana, the trial judge asked Brown if he wished to talk with separate counsel. After a meeting with appointed counsel and a second examination by the judge, Brown invoked his fifth amendment right not to testify based on the possibility of self-incrimination. The defendant then made an offer of proof that Brown would testify: that he has known defendant, Smith, and Dunnigan for a number of years; that Dunnigan and Benjamin were housed in the same cell block at the LaPorte County jail; that he had knowledge that Dunnigan had threatened Smith; and that, on two occasions, Dunnigan asked him to falsely say that the defendant had committed the murder, in exchange for help in his Indiana armed robbery case.

We do not need to address this issue, as it was waived by the defendant. As to both Evans and Brown, the defendant failed to properly object at trial and to raise the issue in his post-trial motion. Therefore, the issue is waived on review. (*People v. Enoch* (1988), 122 Ill. 2d 176, 186.) The issue is also not plain error, as we have already determined that the evidence was not closely balanced, and any error was not of a magnitude to deny defendant a fair trial. *People v. Young* (1989), 128 Ill. 2d 1, 47.

Defendant next argues that he was deprived of his right to present a defense when the trial court informed Brown and Evans about the consequences to their pending cases if they testified on the defendant's behalf. As earlier noted, both Evans and Brown had cases pending against them in the circuit court of Cook County when they were called to testify for defendant. The trial court advised each

of them of the consequences of testifying (as related to their own cases) and had each of them consult with an attorney. Both Brown and Evans then asserted their fifth amendment rights and refused to testify on behalf of the defendant.

The defendant has waived this issue due to his failure to timely object at trial as well as raise the issue with specificity in his post-trial motion. (*Enoch*, 122 Ill. 2d at 190.) Furthermore, the issue does not rise to the level of plain error, as we have already determined that the evidence was not closely balanced, and any error was not of such magnitude as to deny defendant a fair trial. *Young*, 128 Ill. 2d at 47.

The defendant also contends that the trial judge deprived him of his right to present a defense by admonishing two defense witnesses, Constance Smith and Harry Evans, as to the consequences of committing perjury, while the court did not similarly admonish any of the State's witnesses. The defendant argues that the trial judge's admonitions show that that court was biased against defense witnesses.

The defendant failed to raise the issue at trial or in his post-trial motion for a new trial. Therefore, the issue is waived. (*Enoch*, 122 Ill. 2d at 190.) The waiver rule serves an important public policy because a timely objection will allow the circuit court to correct any errors and "a party who fails to object cannot obtain the advantage of receiving a reversal by failing to act." (*People v. Reid* (1990), 136 Ill. 2d 27, 38.) This issue does not rise to the level of plain error since we have already determined that the evidence was not closely balanced and the alleged error was not of a magnitude as to deny the defendant a fair trial. *Young*, 128 Ill. 2d at 47.

The defendant next argues that the trial judge's behavior towards defense counsel had the effect of denying him a fair trial. Defendant gives numerous examples in which he alleges that the trial court acted improperly: by displaying hostility to defendant's attorneys; by belittling defendant's attorneys; by conducting an in-court identification of the defendant; by arguing evidentiary objections before the jury; and by questioning defense witnesses. The State argues that defense counsel was treated fairly and cites the following examples as evidence that the trial judge did not treat the defendant unfairly: sustaining defendant's objections; admonishing the prosecutor; allowing defendant a

continuance to obtain a transcript; and allowing defendant's untimely filed *pro se* motion.

The defendant has waived these issues by not objecting to them at the time the improper actions took place. Furthermore, defendant's post-trial motion contained merely vague, general allegations of error. This court has held that both a contemporaneous objection and a specific allegation in a post-trial motion are necessary to preserve an error for review. (*Enoch*, 122 Ill. 2d at 190.) We additionally find that since the evidence in this case has already been found not to be closely balanced, and the alleged errors were not of a magnitude as to deny defendant a fair trial, they are not plain error. *Young*, 128 Ill. 2d at 47.

The defendant next contends that Lashone Joyner's testimony, that Smith had told her that if anything happened to him, he would be with defendant, was inadmissible hearsay.

Defendant's arguments regarding the testimony in question, references to the testimony by the prosecution in closing argument, and the absence of a relevant limiting instruction have all been waived. (See, *e.g.*, *People v. Thomas* (1990), 137 Ill. 2d 500, 524.) The defendant did not object to Joyner's testimony at trial and did not raise the issue in a post-trial motion, thus waiving objections. (*Enoch*, 122 Ill. 2d at 186.) The defendant did object following the prosecutor's second reference to Joyner's testimony, but he did not set forth this error with specificity in his motion for a new trial, and thus waived that objection on review. (*Enoch*, 122 Ill. 2d at 190.) The defendant also failed to tender a limiting instruction regarding Joyner's testimony, so he cannot raise the issue on appeal. (*People v. Huckstead* (1982), 91 Ill. 2d 536, 543.) Finally, the issue will not be addressed as plain error because we have already found that the evidence was not closely balanced, and any error was not of a magnitude as to deny the defendant a fair trial. *Young*, 128 Ill. 2d at 47.

The defendant also contends that Detective Robertson's testimony, that he had a conversation with Milbon Lockridge ("Poncho") about defendant's case and thus subsequently began searching for him, was erroneously admitted, violating his right of confrontation under the sixth amendment. We find that those statements were not inadmissible hearsay, and therefore were properly

admitted.

At trial, Detective Robertson testified as follows: that in early April 1986, while working on an unrelated case, he spoke with Lockridge about decedent's murder; that he then took Lockridge for an interview with an assistant State's Attorney; that after the interview, he and the assistant State's Attorney brought Lockridge to the grand jury; that later that same day he was assigned to the murder case; that later that month he obtained a warrant for defendant's arrest for the murder of Smith; and that he later learned that the defendant was in the LaPorte County jail, and he lodged the warrant there.

At no time did Detective Robertson testify as to the substance of any of the statements Lockridge had made to him. Defendant, however, argues that Robertson's testimony inferentially revealed that Lockridge had implicated the defendant in the murder.

This court resolved this issue in *People v. Gacho* (1988), 122 Ill. 2d 221, 248-49. In that case, this court held:

> "Had the substance of the conversation that Coakley [the detective] had with Infelise [the witness] been testified to, it would have been objectionable as hearsay. The testimony of Coakley, however, was not of the conversation with Infelise, but to what he did and to investigatory procedure. (*People v. Williams* (1977), 52 Ill. App. 3d 81, 87-88; see also *People v. Wright* (1974), 56 Ill. 2d 523.) As our appellate court stated in considering similar testimony, 'Such testimony is not hearsay because it is based on the officers' own personal knowledge, and is admissible although the inference logically to be drawn therefrom is that the information received motivated the officers' subsequent conduct.' " *Gacho*, 122 Ill. 2d at 248, quoting *People v. Hunter* (1984), 124 Ill. App. 3d 516, 529.

Defendant argues that *Gacho* is distinguishable from the instant case because in *Gacho* the police officer spoke with a victim of the crime, while in this case the officer spoke with a codefendant. We find the defendant's argument to be lacking in persuasiveness because, in both *Gacho* and the instant case, the officer's testimony did not contain hearsay, and simply showed the conduct of the officer's investigation.

The defendant next contends that the trial court improperly precluded his alibi witness, Barbara Baker, from testifying, where the defendant's discovery responses indicated that he would present an alibi and separately showed that Baker would testify. Baker testified that the defendant had been at her house at about 8 p.m. on the night of the murder. The prosecutor then objected when defense counsel asked her how long the defendant was with her, because defense counsel had not notified them of this alibi. According to the prosecution, the defendant had provided them with a different alibi defense, requiring the testimony of a different witness.

In response, defense counsel explained that two witnesses had told them that they would testify regarding the defendant's alibi. The night before Baker's testimony, one of the witnesses told defense counsel that she had been lying, whereupon they decided to use Baker as an alibi witness. Defense counsel's excuse for not informing the prosecution that they were changing both the alibi defense and witness was that they "overlooked in [their] rush saying anything today" because they were "busy doing things in the trial this morning."

The trial judge ruled that he would preclude Baker from testifying because there was no way for the prosecution, at that late date, to effectively assemble and present rebuttal evidence, and because he felt it was clear that the defense counsel knew of the alibi testimony in question, but deliberately withheld disclosing the information during the hearing on the State's motion *in limine* prior to Baker's testimony, choosing rather to surprise the prosecution during Baker's direct examination.

In pertinent part, Supreme Court Rule 413 states:

> "Subject to constitutional limitations and within a reasonable time after the filing of a written motion by the State, defense counsel shall inform the State of any defenses which he intends to make at a hearing or trial and shall furnish the State with the following material and information within his possession or control:
>
> (i) the names and last known addresses of persons he intends to call as witnesses ***
>
> ***
>
> (iii) and if the defendant intends to prove an alibi, specific information as to the place where he maintains he was at the time of the alleged offense." 107 Ill. 2d R. 413(d).

Additionally, Supreme Court Rule 415 provides, in part:

> (b) Continuing Duty to Disclose. If, subsequent to com-

pliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, he shall promptly notify the other party or his counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall be notified.

• • •

(g) Sanctions.

(i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances." 107 Ill. 2d R. 415.

Under Rule 413(d)(iii), the defendant had an obligation, prior to trial, to reveal to the prosecution his alibi, that he was with Baker at the time of the murder, prior to trial. He did not reveal this information in the pretrial discovery. Pursuant to Rule 415(b) the defendant had a continuing duty to promptly notify the State or trial court (if discovered during trial) as to a new alibi. The defendant clearly did not meet his obligation, thus violating Rules 413 and 415.

The only matter, with respect to this issue, left to be decided is whether the trial court abused its discretion in precluding Baker from testifying. The trial court was clearly acting within its discretion, as Rule 415(g)(i) specifically authorizes a trial court to exclude evidence as a sanction. See, *e.g.*, *People v. Partee* (1987), 157 Ill. App. 3d 231, 252-53 (court found that the trial court acted within its discretion when it excluded the testimony of an alibi witness where the *pro se* defendant did not disclose specific information concerning the alibi, in violation of Rule 413(d)(iii)).

The defendant argues that the sanction of preclusion was too harsh, as the trial court could have applied a lesser sanction. This issue was discussed in *Taylor v. Illinois* (1988), 484 U.S. 400, 98 L. Ed. 2d 798, 108 S. Ct. 646. In *Taylor*, on the second day of trial, the defense attorney made an oral motion to amend his discovery answers to include two additional witnesses. Upon inquiry from the trial judge as to why the motion should be granted, counsel represented that he had just been informed about these witnesses. The following day, the

first witness appeared for an offer of proof and revealed that he had actually met with defense counsel a week before the trial started. The trial judge then did not allow either of the witnesses to testify due to defense counsel's blatant violation of discovery rules.

The Supreme Court affirmed the trial court's exclusionary sanction. (*Taylor*, 484 U.S. at 402, 98 L. Ed. 2d at 806, 108 S. Ct. at 648-49.) The Court reasoned that the sanction of preclusion serves an important purpose, noting:

> "One of the purposes of the discovery rule itself is to minimize the risk that fabricated testimony will be believed. Defendants who are willing to fabricate a defense may also be willing to fabricate excuses for failing to comply with a discovery requirement. The risk of a contempt violation may seem trivial to a defendant facing the threat of imprisonment for a term of years. A dishonest client can mislead an honest attorney, and there are occasions when an attorney assumes that the duty of loyalty to the client outweighs elementary obligations to the court." *Taylor*, 484 U.S. at 413-14, 98 L. Ed. 2d at 813, 108 S. Ct. at 655.

In this case, the trial court obviously felt that preclusion was the only effective sanction. That decision was clearly within its discretion, and we cannot find that the trial court abused that discretion.

In regards to Baker's testimony, the defendant also contends that the trial court erred when it struck all of her testimony. The defendant argues that Baker's testimony, that she saw Smith sell drugs and use cocaine, was relevant, because the bag of powder found near Smith's body was not a controlled substance. He argues that this testimony would help to establish his theory that Smith had been murdered by a disgruntled drug buyer whom he had attempted to defraud.

The State argues that the defendant has waived this issue. However, contrary to the State's allegations, the defendant has preserved this issue for review, pursuant to *Enoch*. Immediately after striking Baker's testimony, the trial court adjourned for the day. The next morning, the defendant objected to the striking of Baker's testimony immediately prior to the resumption of the trial. Thus, he complied with the contemporaneous-objection requirement. Additionally, he alleged that the striking of Baker's entire testimony was error in his post-trial motion. As his objection was actually to the striking of the

entire testimony, this was as specific as defendant could get. Thus, he was able to preserve the error for review, by meeting the requirement that the error be objected to specifically in a post-trial motion. *Enoch*, 122 Ill. 2d at 186.

Following the State's objection to the use of Baker as an alibi witness and in the presence of the jury, the trial court stated:

> "Ladies and Gentlemen, I would like to advise you that certain testimony of the witness is to be disregarded, it is to be stricken, you are not to consider it, you are not to draw any inferences from it or speculate any further consideration of the testimony that this witness has given."

It is patently clear, from looking at this statement in the context it was given, that the trial judge was simply instructing the jury not to consider Baker's testimony as it related to defendant's alibi.

Furthermore, defendant invited the error and cannot now complain of it on appeal. (See, *e.g.*, *People v. Miller* (1983), 120 Ill. App. 3d 495, 501 (defendant invited error by failing to request that the trial court *voir dire* the jury about a newspaper article discovered in the possession of one of the jurors, as that is the most frequently utilized method of avoiding an error).) Here, the day following the occurrence of the alleged error, the defendant made an oral motion for a new trial, contending that the trial judge struck all of Baker's testimony. The trial judge denied the motion. The defendant could have then asked that the court reporter read the complained-of remarks, so that the trial court could clarify its position. He did not make this request, thus allowing the jury to continue to labor under what he perceived to be the belief that it was not to consider any of Baker's testimony. As the defendant invited the error, his objection is waived on review.

Defendant next contends that he was denied his due process right to a fair trial because the prosecutor made five allegedly improper comments during closing argument. At the outset, it should be noted that prosecutors have a great deal of latitude in making closing arguments (*People v. Morgan* (1986), 112 Ill. 2d 111, 131; *People v. Stock* (1974), 56 Ill. 2d 461, 467), and the trial court's determination as to the propriety, and possible prejudicial effect, of the prosecutor's closing argument

will be followed, absent a clear abuse of discretion. (*People v. Smothers* (1973), 55 Ill. 2d 172, 176.) In order for a remark to be deemed reversible error, the complained-of remark must have resulted in substantial prejudice to the accused, such that the verdict would have been different had it not been made. (*Morgan*, 112 Ill. 2d at 132.) "In reviewing allegations of prosecutorial misconduct, the closing arguments of both the State and the defendant must be examined in their entirety and the complained-of comments must be placed in the proper context." *People v. Cisewski* (1987), 118 Ill. 2d 163, 175-76.

The first alleged error is that the prosecutor improperly remarked, four times, that the defendant was smiling as he sat at the defense table. The first two references in question were as follows:

> "[ASSISTANT STATE'S ATTORNEY]: Detective Robertson explained to you about the El Rukns street gang, about their temple at 39th and Drexel, about General B-bop, about Poncho and about Derrick Morgan. And he can sit there and smile at you ladies and gentlemen, but don't let that intimidate you, you sworn [*sic*] to take an oath—
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: Objection overruled.
>
> [ASSISTANT STATE'S ATTORNEY]: You have been sworn to take an oath, you sit here as Jurors and you have an obligation to listen to the evidence despite whatever the Defendant has a right to do here in Court.
>
> [DEFENSE COUNSEL]: Objection, your Honor, the Defendant didn't try to do anything here in Court. I object to this line of argument.
>
> THE COURT: The objection is overruled, it will stand. The jury has an opportunity to observe and if in fact there are any statements made by either side that are not consistent with what is happening in this Courtroom they will disregard it completely. Accordingly you may continue with your statement."

It is clear from the preceding remarks that the prosecutor was not referring to the defendant's demeanor. These comments were not error.

Later, it was argued:

> "[ASSISTANT STATE'S ATTORNEY]: Again, how would Benjamin know unless this man, this smiling man here today told him that is what happened.
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: Objection sustained. Mr. Gambony [the Assistant State's Attorney], you may comment on evi-

dence but I ask you to refrain from any other tactics. Proceed from there."

Because the trial court sustained the defendant's objections in the presence of the jury, any arguable error from the prosecutor's references to the defendant's smiling was cured. Further, the defendant did not request that the trial judge instruct the jury or declare a mistrial. (*People v. Hooper* (1989), 133 Ill. 2d 469, 488.) The jury was further instructed that the closing arguments were not evidence. (*Hooper*, 133 Ill. 2d at 492.) Thus, any possible error that may have been brought about by the prosecution's references to the defendant's smiling was harmless, and thus not cause to reverse the judgment. *People v. Caballero* (1989), 126 Ill. 2d 248, 273.

The defendant also argues that comments by the prosecutor that the jury should support Benjamin for coming forward to testify were prejudicial. He argues that this comment appealed to the passions and prejudices of the jury by asserting that, without this jury's support, witnesses in future cases would not come forward to testify. Although the defendant objected at trial, he failed to specifically set forth this error in his post-trial motion, thus waiving the issue on appeal. (*People v. Fields* (1990), 135 Ill. 2d 18, 59-60.) We will also not examine the issue as plain error, as the evidence was not closely balanced and the remarks were not so inflammatory as to deny the defendant a fair trial. *Fields*, 135 Ill. 2d at 60.

The defendant's third point of error in the prosecutor's closing argument is that the prosecutor improperly commented about Benjamin's courage in testifying. Defendant argues that this was improper because no evidence was presented that Benjamin was in any danger. This point of error has been waived, as the defendant failed to object at trial, and did not raise it in his post-trial motion. (*Fields*, 135 Ill. 2d at 59-60.) The point of error is also not plain error, as we have already found that the evidence was not closely balanced and the remark was not so inflammatory as to deny the defendant a fair trial. *Fields*, 135 Ill. 2d at 60.

The defendant's next point of error is that the prosecutor prejudicially commented that no eyewitnesses to the murder came forward because he had threatened or intimidated them. There was no evidence in the record that the defendant had threatened witnesses, or that

there even were eyewitnesses to the murder. This point of error is waived because it was not specifically raised in the defendant's post-trial motion. (*Fields*, 135 Ill. 2d at 59-60.) Further, as we have already determined that the evidence in this case was not closely balanced, and because the remarks were not so inflammatory as to deny the defendant a fair trial, the error does not rise to the level of plain error. *Fields*, 135 Ill. 2d at 60.

Concerning the prosecutor's closing argument, the defendant's final point of error is that the prosecutor referred to defense counsel's closing argument as "the mad rambling of a defense attorney," and "ridiculous" (twice). As to the two complained-of comments that defense counsel's argument was "ridiculous," the error, in the first instance, is waived because the defendant failed to object to it at trial and raise it in his post-trial motion. (*Fields*, 135 Ill. 2d at 59-60.) The second complained-of comment is also waived because defendant failed to include it in his post-trial motion. (*Fields*, 135 Ill. 2d at 59-60.) Additionally, this alleged error does not rise to the level of plain error, as we have already determined that the evidence was not closely balanced, and the remark was not so inflammatory as to deny the defendant a fair trial. *Fields*, 135 Ill. 2d at 60.

As to the prosecutor's comment that the defense counsel's argument was "mad ramblings," defendant's objection was immediately sustained in front of the jury. The trial court further said:

> "I ask you to refrain from using any such terminology. I heard no ramblings, he presented his case as he saw fit and I ask you refrain from making such comment."

Thus, any error in the statement was cured by the trial court, and since we are persuaded that there was ample evidence to find the defendant guilty, the remark was not error. *Ciesewski*, 118 Ill. 2d at 178.

Contrary to the defendant's contention, this remark is different from the one in *People v. Monroe* (1977), 66 Ill. 2d 317, where this court found that a prosecutor's comments that a defendant's closing argument was "preposterous" and "fraudulent," coupled with his expression of his opinion of the defense, was reversible error. (*Monroe*, 66 Ill. 2d at 323-24.) Rather, this case is more closely analogous to *People v. Cantrell* (1977), 55 Ill. App. 3d 270, where the court found that a sustained objection was enough to cure the prosecutor's comment

that some of the defense counsel's cross-examination was "meaningless garbage talk." (*Cantrell*, 55 Ill. App. 3d at 275.) As in *Cantrell*, the prosecutor's comments in the instant case, coupled with the trial court's admonishment, do not rise to the level of reversible error.

The defendant next contends that the trial court erred by not allowing him to call Detective Robertson as his own witness in order to impeach him with his police report (taken from his conversation with Benjamin at the LaPorte County jail). He argued that the police report stated that Benjamin told Robertson that he had his conversation with the defendant two or three days before Memorial Day 1986, and not in mid-May 1986, and that the police report would seriously impeach Benjamin's testimony as to when the conversation occurred, thus impeaching his entire testimony.

The State maintains that because Benjamin admitted, on direct examination, that he may have originally told the police that his conversation with the defendant took place in late May, as opposed to mid-May, and because the discrepancy as to when the conversation occurred was a collateral matter, the trial court properly precluded the defendant from calling Robertson for the purpose of impeaching him with his report.

The trial court's reasoning for holding that the defendant could not impeach Robertson with his own report was that a party cannot impeach his own witness. Initially, it should be noted that the trial court erred in telling defense counsel that a party in a criminal case cannot call a witness solely to impeach that witness. Under Supreme Court Rule 433, the examination of a hostile witness in a criminal case is governed by Supreme Court Rule 238. (107 Ill. 2d Rules 433, 238.) Furthermore, under Supreme Court Rule 238(a), "[t]he credibility of a witness may be attacked by any party, including the party calling him." (107 Ill. 2d R. 238(a).) Nevertheless, as a reviewing court, we can sustain the decision of a trial court for any appropriate reason, regardless of whether the trial court relied on those grounds and regardless of whether the trial court's reasoning was correct. See *Bell v. Louisville & Nashville R.R. Co.* (1985), 106 Ill. 2d 135, 148.

Whether Benjamin had his conversation with the defendant in mid-May 1986, or a few days before Memorial Day 1986, is plainly collateral to the case at hand.

As the appellate court has noted, Supreme Court Rule 238 "does not grant permission to try collateral issues in order to prove the unreliability or untruthfulness of the witness." (*People v. Jones* (1986), 148 Ill. App. 3d 345, 351.) Thus, as the trial court could have based its exclusion on the "collateral issues" principle, the trial court's exclusion of Robertson, solely for the purpose of impeachment, was proper.

Defendant next contends that his due process rights were violated when the trial court refused to grant his request for a hearing on his oral motion to suppress the in-court identification by Benjamin. He argued that one of the prosecuting attorneys had brought Benjamin into the courtroom prior to his testimony, and pointed out the defense attorneys to him. In response, the prosecutor argued that Benjamin had previously identified the defendant from a photo array.

Benjamin testified that, when he originally spoke with the police about this case, he identified defendant's photograph from a photo array, and signed that photo. At trial, he picked the same photo out of a photo array shown to him, and identified his signature.

There is no *per se* rule that, under the due process clause of the fourteenth amendment, a trial court must hold a hearing outside the presence of the jury on the admissibility of identification testimony. (*Watkins v. Souders* (1981), 449 U.S. 341, 66 L. Ed. 2d 549, 101 S. Ct. 654.) Furthermore, "[i]t is the reliability of identification evidence that primarily determines its admissibility." (*Watkins v. Souders*, 449 U.S. at 347, 66 L. Ed. 2d at 555, 101 S. Ct. at 658.) An in-court identification need not be suppressed if the prosecution can show a sufficiently reliable, independent basis for the identification.

The trial court's denial of defendant's request for a hearing was proper, as the prosecutor clearly established that there was an independent basis for Benjamin's in-court identification: Benjamin's previous identification of the defendant from a photo array. Additionally, the defendant did not complain that the earlier photo identification was impermissible suggestive.

The case of *United States v. Davies* (7th Cir. 1985), 768 F.2d 893, is instructive because, in that case, the defendant complained that the in-court identification was unnecessarily suggestive. At the three tables in the courtroom, there were only three males and, according

to the defendant, only he vaguely resembled the description that the witness had earlier given. The court found that the in-court identification was properly admitted because the witness had previously picked the defendant's picture out of a photo array. Thus, the likelihood of a misidentification in court was reduced. *United States v. Davies*, 768 F.2d at 903-04; see also *United States v. Mills* (11th Cir. 1983), 704 F.2d 1553, 1564 (court found that denial of a request for an *in camera* hearing was proper, when the prosecution had established a sufficient, independent basis to show that the in-court identification was correct).

The defendant next argues that the trial court erroneously excluded some evidence, and erroneously admitted other evidence. Because the defendant really raises four different claims, this court will examine each claim separately.

Initially, the defendant argues that the trial court erroneously excluded evidence that there was a large amount of drug traffic in the vicinity of the apartment where Smith's body was found. He argues that this evidence would help to strengthen his theory that Smith, a known drug dealer, was murdered during a drug deal, by someone other than the defendant.

While a defendant in a criminal case may, certainly, attempt to prove any set of facts that tend to show that someone else committed the crime with which he is accused (*Ward*, 101 Ill. 2d at 455), such evidence should be excluded if it is too remote or too speculative (*People v. Dukett* (1974), 56 Ill. 2d 432, 450). The admission of such evidence lies "within the sound discretion of the trial court, and its ruling should not be reversed absent a clear showing of abuse of that discretion." *Ward*, 101 Ill. 2d at 455-56.

Defendant's argument, that an unknown third person may have killed Smith during a drug deal gone bad, based purely on the fact that there is a great deal of drug traffic in the area where the body was found, is incredibly speculative. Clearly the trial court's ruling such evidence inadmissible was not an abuse of discretion.

The defendant also argues that the trial court improperly permitted Lashone Joyner (Smith's girlfriend) to testify that she was pregnant on the night of the murder, and also improperly admitted photographs of Smith.

During direct examination, the prosecutor asked Joyner about her condition at the time of the murder and she stated that she was pregnant. Defendant objected, and the trial judge sustained the objection, specifically admonishing the jury to disregard Joyner's remark. On cross-examination, Joyner said that on the night of the murder, she did not tell the police that B-Bop and Poncho had stopped by the apartment. On redirect examination, she stated that she was pregnant and in a state of shock on the night of the murder, and that is why she forgot to tell the police about B-Bop and Poncho.

It is well settled that a party, on redirect examination, is allowed to question a witness as to matters brought out during cross-examination, and questions may be asked which are designed to remove unfavorable impressions or references raised by cross-examination. (See, *e.g.*, *People v. Chambers* (1989), 179 Ill. App. 3d 565, 577.) Furthermore, the scope of redirect examination is within the sound discretion of the trial judge. (*People v. Davis* (1981), 92 Ill. App. 3d 426, 428.) In this case, the prosecutor asked questions about Joyner's condition on the night of the murder, so as to remove any unfavorable impressions that may have resulted from her cross-examination testimony. Any references that the prosecution brought out about her pregnancy were clearly elicited to help explain why she was in such a state of shock that she forgot to tell the police about B-Bop's and Poncho's visit to her apartment.

Defendant also objects to the admission of "life" photographs of Smith. At trial, Marcia Alexander testified as follows: that she was Smith's sister; that she had last seen Smith alive approximately two weeks before the murder; and that, on the night of the murder, she viewed Smith's body at the Cook County morgue. At this point it was stipulated that if she were shown People's Exhibit No. 1 for identification, she would identify it as a picture of her brother when he was alive. It was further stipulated that she would identify People's Exhibit No. 2 for identification, as a picture of her brother as he looked deceased. Over defendant's objection, People's Exhibits Nos. 1 and 2 were admitted into evidence and submitted to the jury.

The decision whether or not to allow the introduction of photographs of a decedent in a murder trial is within the sound discretion of the trial court (*People v. Lefler* (1967), 38 Ill. 2d 216, 221), and when photographs are

necessary to establish any fact in issue, they are relevant (*People v. Speck* (1968), 41 Ill. 2d 177, 202).In the instant case, as in *Speck*, the photographs were admitted to prove part of the *corpus delicti* of the murder, as well as to corroborate the testimony of the "life and death" witness, Marcia Alexander. (*People v. Lindgren* (1980), 79 Ill. 2d 129, 143-44.) The evidence was admissible despite the defendant's stipulation that Alexander would properly identify the photographs. As this court noted in *Speck*, wherein the defendant offered to stipulate as to the identity of the deceased girls:

> "the defendant pleaded not guilty and the State had the right to prove every element of the crime charged and was not obligated to rely on the defendant's stipulation." *Speck*, 41 Ill. 2d at 201.

On appeal, the defendant attempts to characterize the photographs, as well as the evidence regarding Joyner's pregnancy, as prejudicial victim impact evidence. However, contrary to his assertion, "every mention of a deceased's family does not *per se* entitle the defendant to a new trial." (*People v. Hope* (1986), 116 Ill. 2d 265, 276.) In support of his contentions, the defendant relies on two appellate court cases. Both cases are distinguishable, and therefore not applicable to the instant case. In *People v. Johnson* (1976), 43 Ill. App. 3d 649, 659, the court held that evidence that the complainant and her husband had separated following her rape was harmless given the strength of the State's case. In *People v. Starks* (1983), 116 Ill. App. 3d 384, not only was irrelevant victim impact testimony elicited, but the prosecutor also relied on that testimony in his closing argument. Thus, the evidence concerning Joyner's pregnancy, as well as the photographs of Smith, were properly admitted.

Defendant's final contention of error at the guilt phase of his trial is that the trial court improperly precluded him from arguing during closing argument that he could not have confessed to Benjamin because they were housed in different cell blocks. At trial, defense counsel made the following argument:

> "You remember Sergeant Jordan took the stand, he was in charge of the jail at that time and he told you that people in 5 south central have access with each other during certain hours, the cells are open but he also said they were not free to mingle with people from 5 sooth [*sic*] or from other cell blocks so the activity was within the cell block. He also said Derrick Morgan was in 5 south the entire period of time he was there and particularly around Memorial Day when Benjamin was in 5 south central.
>
> [ASSISTANT STATE'S ATTORNEY]: Objection.
>
> THE COURT: Objection sustained, misstating facts in evidence."

Sergeant Jordan actually testified as follows: that inmates from different cell blocks were not allowed to mingle; that in April of 1986, defendant and Benjamin were both housed in Cell Block 5 South Central; and that he had no personal recollection of where, during May of 1986, Benjamin was located. Therefore, since Jordan did not testify that the defendant and Benjamin were in different cell blocks in May of 1986, Benjamin's testimony that he was in the same cell block as the defendant during that time period is uncontradicted. As any argument to the contrary of Benjamin would not have been based upon evidence in the record (or a legitimate inference therefrom), the trial court's ruling that the argument was proper was not only not prejudicial, but it was also manifestly correct. Therefore, we affirm the defendant's murder conviction.

THE SENTENCING HEARING

The defendant initially contends that he was not eligible for the death penalty because the State failed to prove beyond a reasonable doubt that he committed a "contract" killing. The State argues that it did properly prove the *corpus delicti* of the contract killing.

In order for a defendant to be eligible for the death penalty, the State must prove beyond a reasonable doubt that a statutory aggravating factor exists. (Ill. Rev. Stat. 1987, ch. 38, par. 9—1(f).) Accordingly, in this case, the State had to prove that:

> "the defendant committed the murder pursuant to a contract, agreement or understanding by which he was to receive money or anything of value in return for committing the murder ***." Ill. Rev. Stat. 1987, ch. 38, par. 9—1(b)(5).

In the instant case, this aggravating factor was shown by Benjamin's testimony that the defendant had admitted that he killed Smith for money. The defendant argues that his admission to Benjamin does not constitute sufficient evidence to prove that a contract killing did occur.

A defendant's confession alone is not enough to prove

the *corpus delicti* of a crime. (*People v. Lambert* (1984), 104 Ill. 2d 375, 378.)

> "There must be either some independent evidence or corroborating evidence outside of the confession which tends to establish that a crime occurred. (*People v. Willingham* (1982), 89 Ill. 2d 352, 360.) If there is such evidence, and that evidence tends to prove that the offense occurred, then that evidence, if it corroborates the facts contained in the defendant's confession, may be considered together with the confession to establish the *corpus delicti*." (*Lambert*, 104 Ill. 2d at 378-79.)

However, once there is a showing of corroboration, there is no need to ignore the confession in determining whether the *corpus delicti* has been established. *People v. O'Neil* (1960), 18 Ill. 2d 461, 464.

In this case, the State proved a good deal of corroborating evidence. The Stated showed that on the day of the murder, defendant's fellow El Rukn accomplices, Evans and Lockridge, came looking for Smith at his apartment; that later that same evening, the defendant went to Smith's apartment, and the two left together; and that when Smith's body was found 45 minutes later, there were numerous gunshot wounds to the head, and a bag of white powder next to the body. Thus, it is clear that the killer took elaborate steps to ensure that Smith was dead.

The elaborate nature of the crime helped to bolster and explain the defendant's admission to Benjamin: he had Evans, an El Rukn general, oversee the murder; he resorted to trickery to lure Smith to the vacant apartment; and he fired numerous shots into Smith's head to ensure that he would die. After viewing this evidence in a light most favorable to the prosecution, it is clear that the jury could have found that the defendant killed Smith pursuant to a contract, beyond a reasonable doubt. *Young*, 128 Ill. 2d at 48-50.

Defendant next contends that he was denied a fair and accurate sentencing hearing when the jury was allowed to consider testimony that Smith's girlfriend, Lashone Joyner, was pregnant on the night of the murder, as well as photographs of Smith with a woman and three children. The evidence of the pregnancy and all of the life photographs of Smith were admitted during the guilt phase of the trial, and have previously been found by this court to be proper. The jury, at both phases of

the sentencing hearing, was properly instructed and allowed to consider the evidence presented at the guilt phase of the trial. Illinois Pattern Jury Instructions, Criminal, Nos. 7B.03, 7C.02 (2d ed. Supp. 1989).

The defendant also raises three errors concerning the State's closing argument at the sentencing phase. The first error that the defendant alleges is that the prosecutor misstated the law by telling the jury that its guilty verdict was dispositive of the issue of whether or not the murder was committed pursuant to a contract. The second point of error is that the prosecutor made improper comments to the effect that the defendant bore the burden of proving that the murder was not a contract killing. His final contention of error in the prosecutor's closing argument is that he argued that the defendant "enjoyed" killing people.

These alleged errors have all been waived because the defendant failed to object at trial or raise the issues in his post-trial motion. (*Fields*, 135 Ill. 2d at 59-60.) Furthermore, the issue will not be addressed as plain error because, as we have already found, the evidence in this case is not closely balanced, and the alleged errors are not of such magnitude as to have denied the defendant a fair sentencing. *Young*, 128 Ill. 2d at 47.

The defendant next asserts that he was denied a fair sentencing hearing, at both stages, because the trial court excluded the testimony of Barbara Baker and Sergeant Clayton Jordan. He claims that Baker would have testified that she saw Elbert Dunnigan threaten Smith, with a gun, one week before the killing. He also claims that Jordan would have testified that Dunnigan and Benjamin were housed in the same cell block at the LaPorte County jail. The defendant asserts that this testimony would bolster his theory that Dunnigan had somehow persuaded Benjamin to falsely implicate him. He argues that this evidence was relevant at both stages of his sentencing hearing, because it tends to show his innocence.

At the first stage of a sentencing hearing, only evidence having a direct impact on the statutory prerequisites for the death penalty should be admitted. (*People v. Brisbon* (1985), 106 Ill. 2d 342, 371.) A defendant's evidence that someone else committed the crime with which he is charged should be excluded if it is too remote (*Ward*, 101 Ill. 2d at 455), or if it is too speculative (*Dukett*, 56 Ill. 2d at 450).

As defendant admits, both pieces of evidence go to the question of whether or not he actually committed the crime, and not whether any aggravating factors for the death sentence exist. Thus, due to the nature of the evidence, the trial court did not abuse its discretion in not allowing the defendant to present it at the first stage of his sentencing hearing.

The defendant further argues that he should have been permitted to offer this evidence at the second stage of his sentencing hearing so that the jury could consider "residual doubt." Defendant's position, concerning "residual doubt," is not supported by the case, as this court recently noted:

> "[T]he Supreme Court specifically rejected the claim that defendants convicted of capital crimes have a constitutional right to demand that the jury consider 'residual doubts' over guilt at the sentencing phase. [Citation.] The Court stated that 'residual doubt' over a defendant's guilt is not a 'mitigating circumstance' because it is not a fact about the defendant's character or the circumstances of his crime which may call for a penalty less than death. Accordingly, the Court concluded that the rule that a sentencer may not be precluded from considering any relevant mitigating circumstance did not require consideration of 'residual doubt' over defendant's guilt at the sentencing hearing." *Fields*, 135 Ill. 2d at 67, citing *Franklin v. Lynaugh* (1988), 487 U.S. 164, 172, 101 L. Ed. 2d 155, 165, 108 S. Ct. 2320, 2327.

This evidence was properly excluded at the guilt phase of the trial. Thus, according to the aforementioned principles, the trial court did not act improperly in not allowing the jury to hear this highly speculative evidence at the second stage of the sentencing hearing.

The defendant next argues that his sentence should be vacated and his cause remanded for a new sentencing hearing because the trial judge, during *voir dire*, misled the jurors into believing that they would not actually be sentencing the defendant to death, by informing the venire that they would only "recommend" the death penalty.

The same issue came before this court in *People v. Perez* (1985), 108 Ill. 2d 70, where the defendant argued that his death sentence should be reversed because the trial court "repeatedly" misinformed the jurors that they would "recommend" whether the death penalty should be imposed. The court noted that the record did not support an inference that the jurors were misled into believing that the responsibility for imposing the death penalty lay elsewhere. The jurors were informed (both verbally and in written instructions) that if they sign the verdict form, the trial court *must* sentence the defendant to death. *Perez*, 108 Ill. 2d at 90-91.

The defendant argues that *Perez* is distinguishable because, in that case, the defense had defaulted its claim that the trial court had improperly used the term "recommend" during *voir dire*. (*Perez*, 108 Ill. 2d at 91.) However, the principles of *Perez* are applicable to the facts of this case. In this case, the trial court never used the word "recommend" during either the first or second stage of the sentencing hearing. Furthermore, the jury was instructed (both orally and in writing) that the verdict would read as follows:

> "We the Jury unanimously find that there are no mitigating factors sufficient to preclude imposition of a death sentence.
>
> The Court shall sentence the defendant, Derrick Morgan, to death ***."

The trial court used the term "recommend" only during *voir dire*, and not at the sentencing hearing. The trial court also made numerous statements during the *voir dire* to the effect that the members of the venire may be required to determine whether the defendant should be sentenced to death. Thus any error that the trial court may have made was cured by its subsequent actions.

The defendant next argues that he was denied the right of allocution at sentencing. This court has held that there is no right to allocution during the second stage of the sentencing hearing. (*People v. Gaines* (1981), 88 Ill. 2d 342, 374-79.) Defendant offers no reason why this court should overrule *Gaines*, and we decline to do so.

Defendant also asserts that his rights to a fair sentencing hearing were denied when the prosecution was allowed to give opening and rebuttal closing arguments at the second stage of the sentencing hearing. This procedure is proper and does not violate any of defendant's constitutional rights. *People v. Williams* (1983), 97 Ill. 2d 252, 302-03.

The defendant also contends that he was denied an impartial jury when the trial court refused to ask potential jurors if they would automatically impose the death

penalty if they found the defendant guilty. During jury selection, the defendant requested that the trial court ask prospective jurors: "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?" The trial court denied this request.

This court has already held that "there is no 'reverse-*Witherspoon*' rule that requires the trial court to 'life qualify' a jury to exclude all jurors who believe that the death penalty should be imposed in every murder case." (*Brisbon*, 106 Ill. 2d at 359.) Further, the defendant has not demonstrated, or even suggested, that any of the actual jurors on his jury were biased towards the death penalty. *People v. Caballero* (1984), 102 Ill. 2d 23, 46.

Defendant contends that the questions regarding bias must include the "life qualifying" or "reverse-*Witherspoon*" question, pursuant to *Ross v. Oklahoma* (1988), 487 U.S. 81, 101 L. Ed. 2d 80, 108 S. Ct. 2273. In *Ross*, a prospective juror stated that he would automatically vote for the death penalty if the defendant were found guilty. The trial court refused to excuse the prospective juror for cause, and the defendant used a peremptory challenge to remove the prospective juror from the panel. (*Ross*, 487 U.S. at 83-85, 101 L. Ed. 2d at 86-87, 108 S. Ct. at 2276.) The Court found that although it was error not to excuse that potential juror for cause, the death sentence need not be reversed, as there was no showing that any *juror* on the defendant's jury was *actually* shown to be impartial. *Ross*, 481 U.S. at 91, 101 L. Ed. 2d at 92, 108 S. Ct. at 2280.

In this case, the defendant's jury was selected from a fair cross-section of the community, each juror swore to uphold the law regardless of his or her personal feelings, and no juror expressed any views that would call his or her impartiality into question. Thus, as there was no showing that any actual juror on the defendant's jury was partial, the sentence is valid.

The defendant next contends that it was prejudicial error for the trial court to instruct the jury that mere sympathy should not influence its sentencing decision. The defendant argues that, because his entire case in mitigation shows that he is a sympathetic individual and the mitigating evidence was presented to engender sympathy, the instruction effectively precluded the jury from considering mitigation evidence.

The defendant has waived his right to challenge the propriety of the sympathy instruction by failing to object to the instruction at trial, or in his post-trial motion for a new trial. (*Fields*, 135 Ill. 2d at 73-74.) Moreover, the United States Supreme Court has recently considered the same issue. In *Saffle v. Parks* (1990), 494 U.S. ___, 108 L. Ed. 2d 415, 110 S. Ct. 1257, the defendant had presented mitigating evidence for the sole purpose of eliciting sympathy from the jury, and the trial court subsequently informed the jury that it was not to be influenced by sympathy. The jury then sentenced the defendant to death. (*Saffle*, 494 U.S. at ___, 108 L. Ed. 2d at 423, 110 S. Ct. at 1259.) Because that case came to the Court on collateral *habeas corpus* review, the Court did not reach the merits of the defendant's argument, finding that he was not entitled to relief because his claim would mandate a new rule that cannot be applied retroactively. *Saffle*, 494 U.S. at ___, 108 L. Ed. 2d at 428-29, 110 S. Ct. at 1263.

In *dictum* discussing the defendant's underlying claim, the Court noted:

> "Whether a juror feels sympathy for a capital defendant is more likely to depend on that juror's own emotions than on the actual evidence regarding the crime and the defendant. It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our long-standing recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary." (*Saffle*, 494 U.S. at ___, 108 L. Ed. 2d at 427, 110 S. Ct. at 1262.)

We adopt the Supreme Court's reasoning and conclude, as has been concluded before (see *Fields*, 135 Ill. 2d at 74), that there is no error in the continued use of the sympathy instruction.

The defendant also argues that he was denied a fair sentencing hearing when the prosecution was allowed to present evidence of crimes that he had been charged with, even though he had not been convicted of the crimes. This court has recently addressed this issue and has held that evidence of prior criminal conduct is admissible at a sentencing hearing, even though it was not adjudicated, if it is relevant, reliable, and subject to cross-examination. (*Thomas*, 137 Ill. 2d at 547.) As the evidence in this case fit the aforementioned requirements, it was not error for it to be admitted.

CONSTITUTIONALITY OF THE DEATH PENALTY

The defendant initially argues that the Illinois death penalty statute is unconstitutional because it places the burden of persuasion on the defendant to come forward with mitigating evidence. This court has held that the statute does not unconstitutionally place a burden upon the defendant to come forward with mitigating evidence. See, *e.g.*, *People v. Whitehead* (1987), 116 Ill. 2d 425, 465.

The defendant argues that *Whitehead* conflicts with *People v. Olinger* (1986), 112 Ill. 2d 324, and *People v. Del Vecchio* (1985), 105 Ill. 2d 414. These cases are not in conflict. Rather, in both of those cases, this court simply reiterated, and held constitutional, the rule that once the State establishes the existence of statutory aggravating factors, the defendant then has the burden to come forward with evidence in mitigation sufficient to preclude a sentence of death. (*Olinger*, 112 Ill. 2d at 351; *Del Vecchio*, 105 Ill. 2d at 445-46; see also *Silagy v. Peters* (7th Cir. 1990), 905 F.2d 986, 998 (finding that the Illinois death penalty statute does not unconstitutionally place a burden on a defendant to come forward with evidence in mitigation).

The defendant also contends that the death penalty statute is unconstitutional because it does not adequately minimize the risk of arbitrary and capricious imposition of the death penalty. He points to a number of different factors that, he argues, render the statute unconstitutional. This argument was raised and rejected in *Fields*, 135 Ill. 2d at 75. The defendant simply asks that this line of cases be reconsidered and he has not presented this court with a persuasive argument that would warrant a reversal of *Fields* or any other decision. Therefore, we decline to reconsider this issue.

The defendant also argues that, while various aspects of the Illinois death penalty statute have been found individually constitutional, the cumulative effect of all of the aspects is to render the statute unconstitutionally arbitrary and capricious. This court rejected this argument in *People v. Thomas* (1990), 137 Ill. 2d 500, and the defendant presents nothing new here to persuade us to reconsider. See also *Silagy v. Peters* (7th Cir. 1990), 905 F.2d 986, 990-1001 (rejecting a facial attack on the Illinois death penalty statute).

DEFENDANT'S *PRO SE* POST-TRIAL MOTION

Defendant's final contention is that the trial court erred in not appointing new counsel to investigate his post-sentencing motion for a new trial. In his *pro se* motion for a new trial, the defendant alleged that he had received ineffective assistance of counsel because his attorneys had failed to determine whether Benjamin was a paid informant. At the post-trial hearing, defendant's attorneys admitted that they did not determine whether Benjamin was a paid informant, and they sought to withdraw from the case, and requested that the trial court appoint a new attorney to investigate the defendant's ineffectiveness claims.

There is no *per se* rule requiring a trial court to appoint new counsel every time a post-trial motion includes an allegation of ineffective assistance of counsel. (See, *e.g.*, *People v. Brandon* (1987), 157 Ill. App. 3d 835, 846.) Whether an actual conflict exists is determined by the underlying allegations of ineffectiveness, and a trial court's determination that a claim is spurious will not be overturned unless it is manifestly erroneous. *Brandon*, 157 Ill. App. 3d at 846-47.

In denying the defendant's motion, the trial judge stated:

> "I think that the job that the defense attorneys have preformed in their duties with reference to this case is not questionable, the evidence is quite direct and uncontradicted, and accordingly, I am not going to conjecture on possibilities or facts that are not matters which could be reasonably inferred from the facts involved herein.
>
> We can manufacture any type of case we want to in hindsight. In foresight the facts do not justify any such conclusion."

The trial judge also noted that there was no hint of evidence that Benjamin was a paid informant. In fact, he felt that the argument was nothing more than a "smokescreen." The defendant did not allege any new facts that would tend to show that Benjamin was paid. Accordingly, appointment of new counsel would have been wasteful and futile. See *People v. Dudley* (1970), 46 Ill. 2d 305, 310.

A trial court's findings in this matter will not be reversed unless found to be manifestly erroneous. (*Brandon*, 157 Ill. App. 3d at 847.) Since there was no evidence anywhere in the record that even tended to show

that Benjamin was a paid informant, we cannot find that the trial court's failure to appoint new counsel to investigate the allegations was manifestly erroneous.

For the reasons stated, we affirm the defendant's conviction and sentence for murder. The clerk of this court is directed to enter an order setting Wednesday, May 15, 1991, as the date on which the death sentence, entered in the circuit court of Cook County, is to be carried out. Defendant shall be executed by lethal injection in the manner provided by section 119–5 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1985, ch. 38, par. 119–5). The clerk of this court shall send a certified copy of the mandate in this case to the Director of Corrections, the warden at Stateville Correctional Center, and the warden of the institution in which the defendant is confined.

Judgment affirmed.

JUSTICE BILANDIC took no part in the consideration or decision of this case.

JUSTICE CLARK, dissenting:

Because the State failed to meet its burden of proof with respect to the existence of a statutory aggravating factor, and because the prosecutor made erroneous comments during his arguments at the sentencing hearing, I would vacate defendant's death sentence.

In order to enhance a murder to a capital offense, the State must prove beyond a reasonable doubt that an aggravating factor exists. (Ill. Rev. Stat. 1987, ch. 38, par. 9–1(b).) In this case, the State attempted to prove that the murder was committed pursuant to a contract. (Ill. Rev. Stat. 1987, ch. 38, par. 9–1(b)(5).) The only evidence the State presented to meet its burden with respect to the aggravating factor is Benjamin's testimony regarding defendant's confession to him. While the confession is adequately corroborated with respect to the commission of the murder itself, there is no evidence to corroborate the State's claim that defendant was hired to commit the murder.

As the majority notes, the State produced enough evidence to corroborate certain statements contained in defendant's confession. For example, the details in defendant's confession are consistent with the name of the victim, the location of the shooting, the presence of a

bag of flour, the presence of Evans and Lockridge, and the number of shots fired. These facts sufficiently corroborate defendant's confession, such that the confession, when taken as a whole, supports defendant's conviction for murder.

However, when considered individually, not every statement contained in defendant's confession to Benjamin is consistent with other evidence. In fact, at least one statement is directly contradicted by the physical evidence in the case. According to Benjamin's testimony, defendant stated that he used a .357 pistol in the killing. Although there was no direct testimony regarding the caliber of bullets removed from the victim, testimony tends to show the bullets could not have come from a .357 pistol. The pathologist who performed the autopsy on the victim's body testified that the victim's head was intact, that there were five bullet entry wounds but no exit wounds, and that six bullets were removed from the victim's body. Two of the bullets entered the victim through the same entry wound, which indicates that the shots were fired from an extremely close range. This testimony indicates that the bullets did not come from a large caliber gun, such as a .357 pistol. It is inconceivable that the victim's head would be left intact if the victim received six shots from a .357 pistol at close range. Moreover, a gun that powerful could be expected to produce exit wounds. Therefore, the manifest weight of the evidence shows that contrary to defendant's statement in his confession, a .357 pistol was not used in the murder.

The fact that a .357 pistol was not used in this murder does not of course mandate a reversal of defendant's conviction. Rather the fact defendant lied with respect to this portion of his confession points out that he may have also lied with respect to the money he was to receive for the killing. If, as the State argues, defendant was boasting of his crimes in order to enhance his status among his fellow inmates, it is very possible that he embellished the facts to enhance the story. This is one possible explanation for the inaccurate description of the gun used. Indeed the State specifically argues that defendant "in all likelihood was boasting about the size of the gun he used." Such an explanation can be applied equally to that portion of the confession dealing with the contract. That is, defendant may have lied about the con-

tract in order to enhance his status among fellow inmates.

The fact defendant's confession contained lies is especially relevant because the State produced *no evidence* to corroborate the specific statement that defendant was to receive money for his role in the murder. Given the fact that at least one other statement in the confession was false, I believe the State had the burden of producing evidence to corroborate the individual statement regarding the contract. Because no such evidence was produced, I believe a reasonable doubt exists as to whether the murder was committed pursuant to a contract. Therefore, I would reverse defendant's death sentence.

As support for their finding that the State met its burden, the majority relies on evidence of the steps taken to lure the victim to a vacant apartment, the number of shots fired into the victim, and the fact an El Rukn general witnessed the killing. The majority contends these facts support a finding that the murder was committed pursuant to a contract. This reasoning is tenuous at best. This evidence supports a finding that the murder was premeditated, that defendant had accomplices who may have witnessed the murder, and that defendant took steps to avoid detection. However, it does not in any way indicate the motive for the killing, or that defendant received money for the murder.

In addition to the lack of evidence to corroborate the existence of a contract, numerous statements by the prosecutor during his closing argument at the first phase of the sentencing hearing warrant reversal of the death sentence. The majority concludes that defendant waived objections to these errors because he did not object at trial or include the errors in a post-trial motion. Moreover, the majority concludes that the errors were not plain error because the evidence was not closely balanced. (Slip op. at 30.) Because I believe the evidence was closely balanced with respect to the existence of a contract, I would apply the plain error doctrine and review the alleged errors. *People* v. *Young* (1989), 128 Ill. 2d 1, 47.

The erroneous arguments arose in the sentencing hearing, which is a proceeding separate from the guilt or innocence phase of the trial. (Ill. Rev. Stat. 1987, ch. 38, par. 9—1(d).) Therefore, the only relevant question is whether the evidence was closely balanced with respect

to the existence of a contract. The fact that the confession was corroborated in respects other than the existence of a contract is irrelevant to a determination of whether the evidence was closely balanced in regard to the aggravating factor.

During its opening argument at the sentencing hearing, the State argued that the jury's guilty verdict was equivalent to a finding that the murder was committed pursuant to a contract. Specifically the State argued:

> "With regard to the second propositions, second issue, whether or not the defendant committed the murder as a result of a contract agreement or an understanding whereby he was to receive money, this you have already decided in your guilty verdict. By your guilty verdict you have told the witnesses who were on the stand that, 'We believe those witnesses and we believe what they say.' So, don't go back there and try to rehash your own guilty verdict.
>
> • • •
>
> You have already decided these issues. You have already decided the fact that what William Benjamin told you was backed up, re-enforced [*sic*] corroborated by what LaShone Joyner told you, what the medical examiner told you and what the evidence from Peter Poole and the scene photo showed you. Don't go back and rehash that, ladies and gentlemen.
>
> You[r] duty is easy at this point. You have already found that the second statutory factor, that being that he was convicted of a murder pursuant to a contract agreement or understanding is in place."

Defendant argues these comments misstate the law in that a guilty verdict does not necessarily encompass a finding that the murder was committed pursuant to a contract. I agree.

Initially, I note that there are certainly instances in which a jury's verdict necessarily means that it has also found the existence of an aggravating factor. For example, it is possible for a jury to convict a defendant with armed robbery and murder arising out of the same incident. In such a case, the jury has necessarily determined that the murder occurred in the course of committing another felony. (Ill. Rev. Stat. 1987, ch. 38, par. 9—1(b)(6).) However, in this case no such conclusion may be drawn from the jury's guilty verdict. Motive is not an element of murder, and as such, the jury need not have even considered why the victim was killed. (Ill. Rev. Stat. 1987, ch. 38, par. 9—1(a).) Therefore, the State's

comments that the jury had already decided the issue is not supported by the evidence. At best, these comments could have confused the jurors, and at worst could have misled them.

Defendant contends a second error was made during the State's rebuttal argument when the prosecutor stated: "Why did the murder happen? There was no logical explanation given. Mr. Benjamin's testimony has given the facts and circumstances of the case and it was a contract." Defendant argues that this statement improperly shifted the burden of proof to defendant with respect to the aggravating factor. I agree.

There is a legal presumption that this murder was not committed pursuant to a contract. This is implicit in the fact that the State has the burden of proving beyond a reasonable doubt that an aggravating factor exists. (Ill. Rev. Stat. 1987, ch. 38, par. 9—1(f).) Therefore, defendant need not have produced any evidence on the issue. The State's comment implies that because no other "logical explanation" was presented, Benjamin's testimony must be true. Such a comment misstates the burden of proof in this case. The impact of the error is compounded by the fact defendant has maintained throughout the entire proceeding that he did not commit the murder or confess to Benjamin. Accordingly, defendant could not be expected to put on evidence that he had a different motive for the killing.

The combined effect of the State's improper comments may have misled the jury into believing that it had already decided the existence of an aggravating factor, and that defendant had the burden of disproving this factor. Taken alone each of these comments is reversible error. Together the effect is even more apparent. Therefore, I would reverse defendant's death sentence and remand for a new sentencing hearing.

JUSTICE FREEMAN joins in this dissent.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

April 1, 1991

Mr. Charles M. Schiedel
State Appellate Defender-Sup. Ct. Unit
P. O. Box 5720
Springfield, IL 62705-5720

No. 67692 - People State of Illinois, appellee, v. Derrick Morgan, appellant. Appeal, Circuit Court (Cook).

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

Bilandic, J., took no part.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on April 11, 1991.

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

DERRICK MORGAN, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

NOTICE AND PROOF OF SERVICE

TO: Honorable William K. Suter
Clerk of the Supreme Court
of the United States
1 First Street N.E.

Mr. Jack O'Malley
State's Attorney
309 Daley Center
Chicago, IL 60602

Mr. Roland Burris
Attorney General
100 West Randolph, 12th Floor
Chicago, IL 60601

Mr. Derrick Morgan
Register No. A-10514
Box 99
Pontiac, IL 61764

Please take notice that I have mailed the original and ten copies of the Petition for Writ of Certiorari in the above-captioned matter to the Clerk of the Court and that I am serving the Attorney General and State's Attorney each with three copies and the Petitioner with one copy by depositing the copies in the mail in Springfield, Illinois, with sufficient prepaid postage and addressed as indicated above on this 12 day of July, 1991.

CHARLES M. SCHIEDEL
Deputy Defender

COUNSEL FOR PETITIONER

JULEANN HORNYAK
CLERK OF THE COURT
(217) 782-2035

STATE OF ILLINOIS
SUPREME COURT CLERK
SUPREME COURT BUILDING
SPRINGFIELD 62706

FIRST DISTRICT OFFICE
ROOM 30-129
RICHARD J. DALEY CENTER
CHICAGO 60602
(312) 793-1332

April 9, 1991

Mr. Charles M. Schiedel
Deputy Defender
Office of the State Appellate Defender
Supreme Court Unit
P.O. Box 5720
400 South Ninth Street, Suite 101
Springfield, IL 62705-5720

RECEIVED
OFFICE OF THE
STATE APPELLATE DEFENDER
SUPREME COURT UNIT

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 67692 - People State of Illinois, appellee, v. Derrick Morgan, appellant.

The motion by the appellant for a stay of mandate pending the filing and disposition of writ of certiorari in the United States Supreme Court is allowed.

A copy of the order is attached.

JH:kp
Encl.

cc: AG Crim
SA Crim

No. 67692

IN THE

SUPREME COURT OF ILLINOIS

People State of Illinois,	)	
	)	
Appellee	)	TR86CR5816
	)	
v.	)	
	)	Hon. Arthur J. Cieslik
Derrick Morgan	)	Judge Presiding
	)	
Appellant	)	

ORDER

This matter has come for consideration upon the motion of appellant, Derrick Morgan, to stay the mandate of this Court pending appeal or application for certiorari in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of a notice of appeal or an application for certiorari or the expiration of the period within which said application or notice may be filed. If certiorari is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or certiorari may be sought.

William G. Clark

Justice, Supreme Court of Illinois

NO. 67692

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS	)	Appeal from the Circuit Court of Cook County, Illinois.
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	No. 86-CR-5816
	)	
DERRICK MORGAN,	)	Honorable Arthur J. Cieslik,
	)	
Defendant-Appellant.	)	Judge Presiding.

MOTION FOR STAY OF MANDATE

Now comes affiant, ALLEN H. ANDREWS, Assistant Defender, and states that he is counsel for the defendant-appellant in the above-entitled cause and that he, in good faith, intends to seek review by the United States Supreme Court of this Court's decision in the above-entitled cause by the filing of a Petition for Writ of Certiorari. Counsel therefore requests that this Court stay the mandate in the above-entitled cause until disposition of the case by the United States Supreme Court.

Respectfully submitted,

Allen H. Andrews

ALLEN H. ANDREWS
Assistant Defender

COUNSEL FOR DEFENDANT-APPELLANT

Subscribed and sworn to before me on this 3rd day of April, 1991.

Arlene Kay Montgomery

NOTARY PUBLIC

OFFICIAL SEAL
ARLENE KAY MONTGOMERY
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 12-3-94

NO. 67692

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County, Illinois.
Plaintiff-Appellee,	)	
vs.	)	No. 86-CR-5816
DERRICK MORGAN,	)	Honorable Arthur J. Cieslik,
Defendant-Appellant.	)	Judge Presiding.

AFFIDAVIT OF FILING IN THE UNITED STATES SUPREME COURT

I, CHARLES M. SCHIEDEL, Deputy Defender, Office of the State Appellate Defender, do state on oath that on July 1, 1991, the Petition for Writ of Certiorari was filed in the United States Supreme Court in the above-captioned cause.

CHARLES M. SCHIEDEL
Deputy Defender
Office of the State Appellate Defender
Supreme Court Unit
P.O. Box 5720
400 South Ninth Street, Suite 101
Springfield, IL 62705-5720
(217)782-1989

Subscribed and sworn to
before me on this 1st
day of July, 1991.

Sheila Ann Hustava
NOTARY PUBLIC

OFFICIAL SEAL
SHEILA ANN HUSTAVA
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 12-17-94

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

No. 91-5118

IN THE

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

DERRICK MORGAN,

vs.

PEOPLE OF THE STATE OF [illegible],

[illegible]

BRIEF FOR [illegible]
IN OPPOSITION TO [illegible]
FOR WRIT OF [illegible]

ROLAND W. BURRIS
Attorney General, State of Illinois
THERESE M. [illegible]
Assistant Attorney General
100 West Randolph Street
Suite [illegible]
Chicago, Illinois 60601
Attorneys for Respondent

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Assistant State's Attorney
Counsel of Record
MARIE QUINLIVAN CZECH
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Of Counsel

Midwest Law Printing Co., Chicago 60611, (312) 321-0999

No. 91-5118

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DERRICK MORGAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To
The Supreme Court Of Illinois

BRIEF FOR RESPONDENT
IN OPPOSITION TO THE PETITION
FOR WRIT OF CERTIORARI

ROLAND W. BURRIS
Attorney General, State of Illinois
TERENCE M. MADSEN
Assistant Attorney General
100 West Randolph Street
Suite 1200
Chicago, Illinois 60601
Attorneys for Respondent

JACK O'MALLEY
State's Attorney of Cook County
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-5496
RENEE GOLDFARB
Assistant State's Attorney
Counsel of Record
MARIE QUINLIVAN CZECH
Special Assistant State's Attorney
Of Counsel

Mowat Law Printing Co., Chicago (312) 922-0220

QUESTION PRESENTED FOR REVIEW

Whether this Court would be giving an advisory opinion if it grants Certiorari to consider whether petitioner's jury should have been life qualified where the Illinois Supreme Court has already made a finding of fact that petitioner's jury was fair and impartial.

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TABLE OF AUTHORITIES

Cases:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DERRICK MORGAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENT IN OPPOSITION TO THE
PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The Supreme Court of Illinois decided this case on February 22, 1991. Rehearing was denied on April 1, 1991. The opinion is reported at 142 Ill. 2d 410, 568 N.E.2d 755 (1991).

STATEMENT OF JURISDICTION

\.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent accepts petitioner's presentation of the Sixth and Fourteenth Amendments.

STATEMENT OF THE CASE

Defendant stands convicted of the murder of David Smith. Defendant was hired by the El Rukn street gang to kill Smith since Smith was selling narcotics in El Rukn territory. Defendant picked Smith up from Smith's apartment and told him they had some cocaine to buy. Defendant and Smith then went to an abandoned apartment. When Smith tasted the "cocaine," he discovered it was really flour. Defendant then shot Smith in the head six times. Defendant was paid $4,000 for the murder.

The same jury that convicted defendant also sentenced him to the death penalty.

Prior to trial, defendant asked the trial court to "life qualify" the jury by asking the prospective jurors if they would

automatically impose the death penalty if they found defendant guilty of the murder. The trial court refused to ask the question.

On direct appeal to the Illinois Supreme Court, petitioner argued that Ross v. Oklahoma, 487 U.S. 81 (1988) requires that potential jurors must be life qualified. The Illinois Supreme Court held:

> In Ross, a prospective juror stated that he would automatically vote for the death penalty if the defendant were found guilty. The trial court refused to excuse the prospective jurors for cause, and the defendant used a peremptory challenge to remove the prospective jurors from the panel. (Ross, 487 U.S. at 83-85, 108 S.Ct. at 2276, 101 L.Ed.2d at 86-87.) The court found that although it was error not to excuse that potential juror for cause, the death sentence need not be reversed, as there was no showing that any juror on the defendant's jury was actually shown to be impartial. Ross, 487 U.S. at 91, 108 S.Ct. at 2280, 101 L.Ed.2d at 92.
>
> In this case, the defendant's jury was selected from a fair cross-section of the community, each juror swore to uphold the law regardless of his or her personal feelings, and no juror expressed any views that would call his or her impartiality into question. Thus, as there was no showing that any actual juror on the defendant's jury was partial, the sentence is valid.

568 N.E.2d at 778.

Petitioner now asks this Court to grant Certiorari to consider whether the prospective jurors should have been life qualified.

REASONS FOR DENYING THE WRIT

THE WRIT OF CERTIORARI SHOULD BE DENIED SINCE PETITIONER'S JURY WAS FAIR AND IMPARTIAL. THIS PETITIONER IS MERELY SEEKING AN ADVISORY OPINION ABOUT WHETHER PROSPECTIVE JURORS SHOULD BE LIFE QUALIFIED. FURTHER, LIFE QUALIFYING QUESTIONS ARE UNNECESSARY IN ILLINOIS SINCE OTHER QUESTIONS DURING VOIR DIRE AND JURY INSTRUCTIONS ASSURE A DECISION BY A FAIR AND IMPARTIAL JURY.

Petitioner asks this Court to grant Writ of Certiorari to consider whether the prospective jurors should have been life qualified by asking them whether they would automatically impose death if they found defendant guilty of murder.

The Writ of Certiorari should be denied because petitioner has no direct interest in this question. The Illinois Supreme Court has already found that all of the members of the petitioner's jury were fair and impartial. Thus, even if this Court holds that the question should have been asked of the jurors, it will have no impact on petitioner. As in Ross v. Oklahoma, 487 U.S. 81 (1988), there would be no reason to reverse petitioner's conviction or sentence since both were imposed by a fair and impartial jury.

Moreover, as the instant case demonstrates, fair and impartial juries can be drawn in Illinois without "life qualifying" them. During voir dire, prospective jurors are asked

NO. 91-5118

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DERRICK MORGAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PROOF OF SERVICE

The undersigned, being first duly sworn, deposes and says that he served 3 copies of the Respondent's Brief in Opposition to the Petition for Writ of Certiorari in the above-entitled cause by depositing the same in the United States Mail at Chicago, on the 30th day of August, 1991 properly stamped and addressed to:

CHARLES M. SCHIEDEL
State Appellate Defender
400 South Ninth Street
P.O. Box 5720
Suite 101
Springfield, Illinois 62705-5720
Attention: **ALLEN H. ANDREWS**

ROLAND W. BURRIS,
Attorney General
State of Illinois
TERENCE M. MADSEN,
Assistant Attorney General
100 West Randolph Street, Suite 1200
Chicago, Illinois 60601

William Henderson

STATE OF ILLINOIS
COUNTY OF COOK
Signed or Attested Before Me
this 30th day of August, A.D., 1991.

"OFFICIAL SEAL"
PATRICK A. KESSLER
Notary Public, State of Illinois
My Commission Expires 11/17/93

(Seal)

Patrick A. Kessler
Signature of Notary Public

NO. 91-5118

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DERRICK MORGAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PROOF OF TIMELY FILING

The undersigned, being first duly sworn, deposes and says that in compliance with Supreme Court Rule 28.2, 12 copies of the Respondent's Brief in Opposition to the Petition for Writ of Certiorari were timely filed in this cause by depositing the same in the United States Mail at the United States Post Office, Chicago, Illinois, at 4:30 p.m. on the 30th day of August, 1991 with first-class postage prepaid and addressed to:

MR. WILLIAM K. SUTER, CLERK
United States Supreme Court
Supreme Court Building
Washington, D.C. 20543

William Henderson

STATE OF ILLINOIS
COUNTY OF COOK
Signed or Attested Before Me
this 30th day of August, A.D., 1991.

"OFFICIAL SEAL"
PATRICK A. KESSLER
Notary Public, State of Illinois
My Commission Expires 11/17/93

(Seal)

Patrick A. Kessler
Signature of Notary Public

whether they could be fair. See People v. Teague, 108 Ill. App. 3d 891, 439 N.E.2d 1066, cert.denied, 464 U.S. 867 (1982). During the death penalty proceedings, the jurors are repeatedly instructed that they must first determine whether a defendant is eligible for death. If the defendant is found eligible, only then must the jurors weigh the factors in mitigation and aggravation and determine whether there is any mitigating factor which precludes imposition of the death penalty. See People v. Albanese, 104 Ill. 2d 504, 473 N.E.2d 1246 (1984). Petitioner's argument supposes that the jurors would lie during voir dire and would refuse to follow the instructions given during the sentencing hearing. Petitioner's supposition is the antithesis of all that the American jury system represents.

In conclusion, the Writ of Certiorari should be denied since petitioner's jury was fair and impartial. This petitioner is merely seeking an advisory opinion about whether prospective jurors should be life qualified. Further, life qualifying questions are unnecessary in Illinois since other questions during voir dire and jury instructions assure a decision by a fair and impartial jury.

CONCLUSION

For all the foregoing reasons, the Respondent respectfully prays that this Honorable Court deny the petition for Writ of Certiorari.

Respectfully submitted,

ROLAND W. BURRIS,
Attorney General
State of Illinois
TERENCE M. MADSEN,
Assistant Attorney General
100 West Randolph Street, Suite 1200
Chicago, Illinois 60601

Attorneys for Respondent.

JACK O'MALLEY
State's Attorney
County of Cook
309 Richard J. Daley Center
Chicago, Illinois 60602
RENEE GOLDFARB,*
Assistant State's Attorney,
MARIE QUINLIVAN CZECH,
Special Assistant State's Attorney,
Of Counsel.

*Attorney of Record

OFFICE OF THE STATE APPELLATE DEFENDER
SUPREME COURT UNIT

400 SOUTH NINTH STREET - SUITE 101
P.O. BOX 5720
SPRINGFIELD, ILLINOIS 62705-5720
TELEPHONE 217/782-1989

CHARLES M. SCHIEDEL
DEPUTY DEFENDER

July 1, 1991

Honorable William K. Suter
Clerk of the Supreme Court
of the United States
1 First Street, N.E.
Washington, D.C. 20543

RE: Derrick Morgan v. People of the State of Illinois

Dear Mr. Suter:

I have enclosed the Petition for Writ of Certiorari in the above-entitled cause. Please also find the following:

Appearance form,

Affidavit of mailing,

Motion for leave to proceed in forma pauperis,

Affidavit of indigency of the petitioner, and

Copy of the order of the Illinois Supreme Court staying petitioner's mandate, and a copy of counsel's affidavit required by that order.

Sincerely,

CHARLES M. SCHIEDEL
Deputy Defender

CMS:sah

Enclosure

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

DERRICK MORGAN, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

A F I D A V I T

I, CHARLES M. SCHIEDEL, state on oath:

1. I am a member of the Bar of the United States Supreme Court.

2. I am counsel of record for DERRICK MORGAN.

3. At. 4:30 p.m., on July 1, 1991, I deposited in the United States Post Office in Springfield, Illinois, with first class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court, the original and ten copies of the Petition for Writ of Certiorari in the above-entitled cause.

3. The Petition for Writ of Certiorari is due to be filed June 30, 1991.

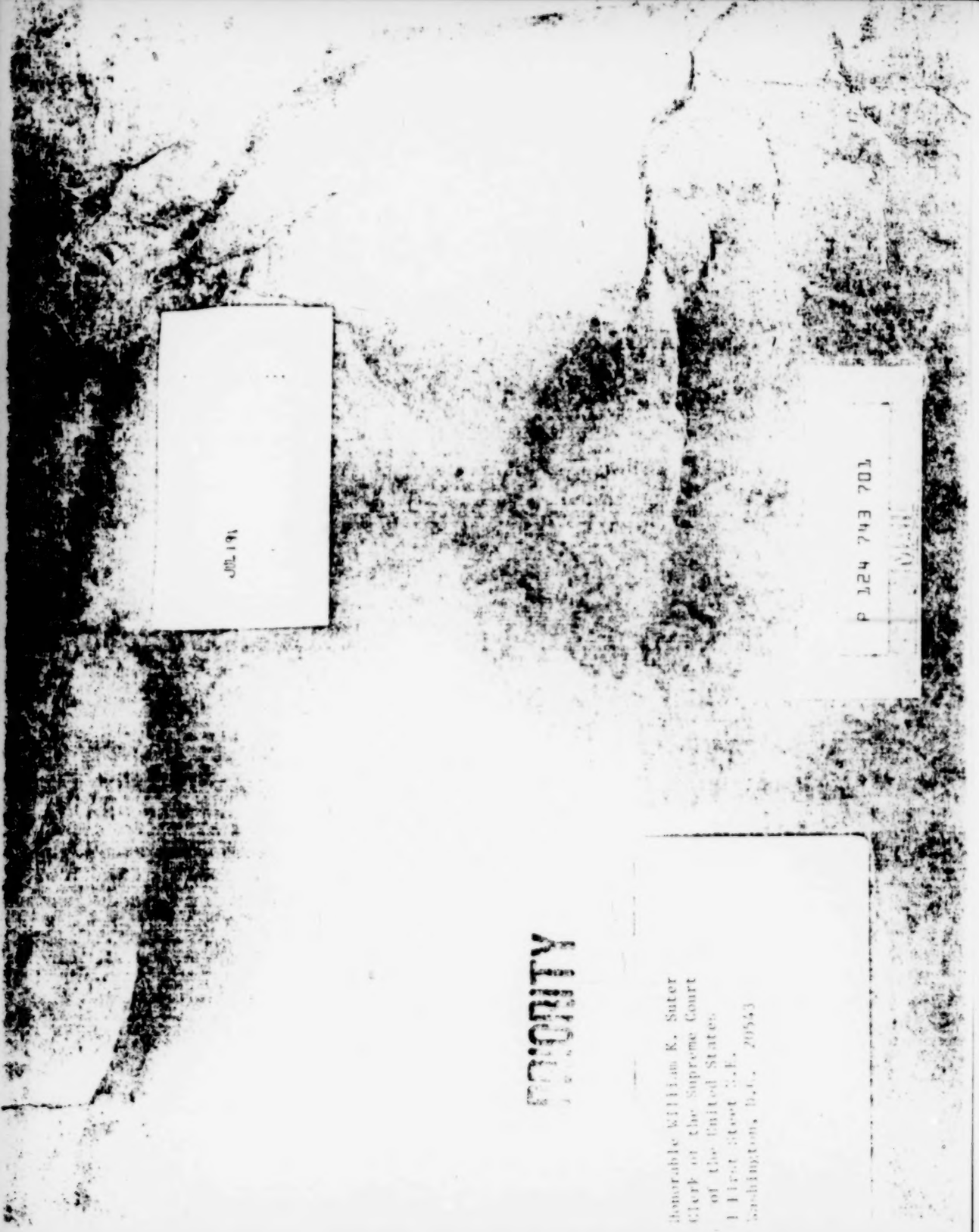
5. FURTHER AFFIANT SAYETH NOT.

CHARLES M. SCHIEDEL
Deputy Defender

COUNSEL FOR PETITIONER

Subscribed and sworn to
before me on this 1st
day of July, 1991.

NOTARY PUBLIC



APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. _____

DERRICK MORGAN (Petitioner) *vs.* PEOPLE OF THE STATE OF ILLINOIS (Respondent)

The Clerk will enter my appearance as Counsel of Record for DERRICK MORGAN

(Please list names of all parties represented)

who IN THIS COURT is ☒ Petitioner(s) ☐ Respondent(s) ☐ Amicus Curiae

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature _____

(Type or print) Name CHARLES M. SCHIEDEL

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

Firm OFFICE OF THE STATE APPELLATE DEFENDER

Address 400 South Ninth, Suite 101, P.O. Box 5720

City & State Springfield, IL Zip 62705-5720

Phone (217) 782-1989

Rule 9

APPEARANCE OF COUNSEL

.1. An attorney seeking to file a pleading, motion, or other paper in this Court in a representative capacity must first be admitted to practice before this Court pursuant to Rule 5. The attorney whose name, address, and telephone number appear on the cover of a document being filed will be deemed counsel of record, and a separate notice of appearance need not be filed. If the name of more than one attorney is shown on the cover of the document, the attorney who is counsel of record must be clearly identified.

.2. An attorney representing a party who will not be filing a document must enter a separate notice of appearance as counsel of record indicating the name of the party represented. If an attorney is to be substituted as counsel of record in a particular case, a separate notice of appearance must also be entered.

No. 91-5118

In The

Supreme Court of the United States

October Term, 1991

DERRICK MORGAN,

Petitioner,

vs.

ILLINOIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

JOINT APPENDIX

CHARLES M. SCHIEDEL
Deputy Defender

ALLEN H. ANDREWS, III*
Assistant Defender
Office of the State
Appellate Defender
Supreme Court Unit
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MARIE QUINLIVAN CZECH
Assistant State's Attorneys
Of Counsel

Counsel for Respondent

*Counsel of Record

Petition For Writ Of Certiorari Filed July 1, 1991
Certiorari Granted October 15, 1991

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RELEVANT DOCKET ENTRIES

Date	Proceeding
4/7/86	Indictment filed.
7/13/88	Judgement entered on verdict.
7/15/88	Judgement entered on sentence.

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS

Illinois

v.

Derrick Morgan

* * *

MR. HYNES: Judge, two additional matters. I would tell counsel right now, we are seeking to have the jury Witherspooned, if in fact this is a jury, we would be seeking a death penalty for in fact the – if in fact the defendant was convicted of murder as to that motion.

* * *

IN THE CIRCUIT COURT OF COOK COUNTY

CRIMINAL DIVISION

No. 86-5816

(Caption Omitted In Printing)

MOTION TO PRECLUDE THE STATE FROM "DEATH QUALIFYING" A POTENTIAL JURY OR, IN THE ALTERNATIVE, MOTION FOR A HEARING TO DETERMINE THAT THERE IS A "SUBSTANTIAL PROBABILITY" THAT THE DEFENDANT IS ELIGIBLE FOR THE DEATH PENALTY

Now comes the defendant, DERRICK MORGAN, through his attorney, PAUL P. BIEBEL, by Assistant Public Defenders James L. Rhodes and Luther S. Hicks of the Multiple Defendant Division, and moves this Honorable Court to preclude the State from "death qualifying" or "Witherspooning" any potential jury or, in the alternative, requiring that the State demonstrate that there is "substantial probability" that Derrick Morgan is eligible

for a death sentence under Ill. Rev. Stat., 1986, Chapter 38, sec. 9-1 (b).

In support of this motion, Derrick Morgan states as follows:

1. Derrick Morgan is charged with the offense of murder.

2. The State has indicated that it will seek the death penalty in the event that Derrick Morgan is convicted of this offense and that it intends, prior to trial, to "death qualify" potential jurors.

3. The process of "death qualification" deprives Derrick Morgan of a fair and impartial trial jury in violation of the Sixth and Fourteenth Amendments, in that:

a) it produces a body of jurors that are more likely to find Derrick Morgan guilty than a jury that has not been "death qualified"; and

b) it prejudicially limits a fair cross-section of the community to decide the separate questions of guilt and appropriateness of the death penalty. *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir. 1985). (See also the study in *Law and Human Behavior*, appended to Motion to Preclude Witherspooned Jury).

4. In the event that this Court does not find that the Sixth and Fourteenth Amendments do not preclude the process of "death qualification", the effect of that process in producing conviction-prone juries is sufficient to require the State to prove that there is substantial probability that Derrick Morgan will be eligible for the death penalty if he is convicted.

5. Based on the allegations set forth in the indictment, it appears that the State will request the death penalty based on Ill. Rev. Stat., 1986, Chapter 38, sec. 9-[sic]

6. The State cannot prove beyond a reasonable doubt, as required by *People v. Tiller*, 94 Ill.2d 303, 447 N.E.2d 174 (1983), that Derrick Morgan is eligible for a death sentence.

7. Fundamental fairness and Due Process of Law under the Federal Constitution, Amendment XIV, and Article I, Section 2 of the Illinois Constitution, require that some substantial preliminary showing be made that the State will be able to prove beyond a reasonable doubt that Derrick Morgan is eligible for a death sentence, before engaging in the process of "death qualifying" a jury, cf. *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

WHEREFORE, Derrick Morgan asks that this Court preclude the State from "death qualifying" the potential jurors in this case, or, in the alternative, determining prior to trial that there is a substantial probability that the State will be able to prove beyond a reasonable doubt that Derrick Morgan is eligible for the death penalty.

Respectfully submitted,
PAUL P. BIEBEL
Public Defender of Cook County

BY: Luther S. Hicks
Luther S. Hicks
James L. Rhodes
Assistant Public Defenders
Chicago, Illinois 60605

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
CRIMINAL DIVISION

No. 86-5816

(Caption Omitted In Printing)

MOTION TO PROHIBIT DEATH-QUALIFICATION OF THE JURY AT THE GUILT/INNOCENCE STAGE OF THE TRIAL

Now comes the defendant, DERRICK MORGAN, through his attorney, PAUL P. BIEBEL, Public Defender of Cook County, by Assistant Public Defenders James L. Rhodes and Luther S. Hicks, of the Multiple Defendant Division and asks this Honorable Court to refuse to death-qualify the prospective jurors in his upcoming trial for the following reasons:

1. Death-qualified juries are conviction prone. Derrick Morgan respectfully asks that this Honorable Court take judicial notice of the attached study which was published in Volume 8 of *Law and Human Behavior* which clearly demonstrates this proposition. Indeed, in *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir. 1985), this study's author's [sic] were specifically recognized as experts in their field, as they were in *Hovey v. California*, where these studies were actually presented. See also *People v. Mahotvich*, 101 Ill.2d 208, 461 N.E.2d 964 (1984).

2. If this Honorable Court will not take judicial notice of the attached study, then Derrick Morgan respectfully [sic] requests a hearing in which he may present this

evidence. Mr. Morgan also requests that this Honorable Court order the requisite funds necessary to conduct such a hearing as he is indigent and without funds to procure the testimony required.

3. If this Honorable Court declines to grant either of the two requests above, then Derrick Morgan asks as a less-favored alternative that the attached study be considered as an offer of proof.

4. The purpose of a bifurcated trial is to prevent irrelevant and prejudicial considerations from affecting either the guilt/innocence stage or the sentencing stage.

5. The purpose of the first stage of an Illinois death penalty case is to determine guilt or innocence. Sentencing considerations are totally irrelevant to the first stage.

6. Accordingly, all questions pertaining to the death penalty at this point in the proceedings violate the intent of the Illinois legislature to bifurcate the trial, and violate the Eighth and Fourteenth Amendments' exacting standards of fairness. *Gregg v. Georgia*, 428 U.S. 153 (1976).

7. In addition, the feelings, beliefs, impressions and religious, moral or other objections regarding the death penalty are totally irrelevant to a prospective juror's qualifications to serve on the jury. A prospective juror expressing scruples (a qualified objection on moral, religious or other grounds) against the death penalty may not be dismissed for cause. *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Similarly, a prospective juror, whose objections to the death penalty would prevent him or her in all cases from voting for its imposition may not be dismissed for cause. *Witherspoon* left open this constitutional issue,

due to a lack of empirical data: whether these individuals were "defense-prone" on the guilt or innocence issue, which would have led the Supreme Court to conclude that their exclusion would deny defendant his constitutional right to a fair trial. Numerous other studies after *Witherspoon* have concluded that those in favor of the death penalty are indeed prosecution-prone on the guilt or innocence issue. H. Zeisel, *Some Data on Juror Attitudes Toward Capital Punishment* (1968); Goldberg, *Towards Expansion of Witherspoon: Capital Scruples, Jury Bias and the Use of Psychological Data to Raise Legal Presumptions*, 5 Harv. Civ. Rights – Civ. L. Rev. 53 (1970); Bronson, *On the Conviction Proneness and Representativeness of the Death Qualified Jury; An Empirical Study of Colorado Veniremen*, 42 U.S. Colo. L. Rev. (1970); Jurow, *New Data on the Effect of a "Bench Qualified" Jury on the Guilt Determination Process*, 84 Harv. L. Rev. 567 (1971).

8. In addition, any time spent on discussing the death penalty before conviction may result in a waste of time if Derrick Morgan is found not guilty or if the prosecution in exercising its discretion granted by 9-1 (d) fails to request a death sentence hearing. Considerations of judicial economy require that "death qualification" not occur during the pre-trial voir dire.

WHEREFORE, for the above-stated reasons, Derrick Morgan requests this Honorable Court to preclude the prosecution from asking prospective jurors any questions

pertaining to the death penalty during the voir dire examination.

Respectfully submitted,
PAUL P. BIEBEL
Public Defender of Cook County

BY: Luther S. Hicks
By: James L. Rhodes
Luther S. Hicks
Assistant Public Defenders
Chicago, Illinois 60605

IN THE CIRCUIT COURT OF COOK COUNTY

(Caption Omitted In Printing)

* * *

Okay, ladies and gentlemen. The nature of the charge before the Court is a case where the charge is murder. In this case the State has elected to treat this case as a capital case, which means the case will be tried in two phases. First phase will be decided whether or not the defendant is guilty of the charges before this Court. The second phase, the jury may be required to participate to decide whether or not the defendant qualifies for the imposition of the death sentence; and further, whether or not the death sentence should be imposed upon the defendant.

As I stated, the second phase is problematical, which means the Court may be required to make that dfecision [sic].

Primarily the function and duty of the jurors is to decide the guilt of the defendant on the charges pending against him.

Do you have any moral or religious conviction against the death penaltythat [sic] would violate your principal to vote to recommend the death penalty regardless of the facts? Do any of you have those thoughts?

Will you stand up?

PROSPECTIVE JUROR: I am Saintified and –

THE COURT: You are what?

PROSPECTIVE JUROR: Saintified. My religion. I don't believe in capital punishment because I have a son that was killed three years ago, and I don't think I would be fair to judge another one.

THE COURT: Would you come forward. Take care of them.

PROSPECTIVE JUROR: My position, I don't feel that I would vote for capital punishment.

THE COURT: Why?

PROSPECTIVE JUROR: Because of my belief.

THE COURT: What is the nature of your belief?

PROSPECTIVE JUROR: I don't believe that I have the right. I don't believe that I could do that.

THE COURT: Is that based upon your moral conviction or religious conviction?

PROSPECTIVE JUROR: Moral and religious conviction.

THE COURT: You are excused. Thank you.

Again. We will start on the left-hand side. Please, anybody else on that side? Yes, sir.

PROSPECTIVE JUROR: I do not believe in the death penalty morally and religiously.

THE COURT: What is your religion?

PROSPECTIVE JUROR: I am Catholic. I do not believe in the death penalty.

THE COURT: You feel if you were required to make that determination you couldn't follow the rules of law with reerence [sic] to that, is that right?

PROSPECTIVE JUROR: Yes, sir.

THE COURT: You are excused. Anybody else on that side?

PROSPECTIVE JUROR: I have a similar feeling. I don't believe in capital punishment.

THE COURT: What do you mean when you say you don't believe in capital punishment?

PROSPECTIVE JUROR: I would find it difficult to vote for the death penalty primarily on moral grounds to be very honest with myself.

THE COURT: So that if the problem was presented to you, and you had to make that determination –

PROSPECTIVE JUROR: I would be very hesitant.

THE COURT: The fact that you are hesitant, could you in fact reach a decision whether or not a

particular individual should be recommended to be sentenced to death?

PROSPECTIVE JUROR: I would probably not vote.

THE COURT: I don't understand what you mean.

PROSPECTIVE JUROR: I am telling you very openly and honestly.

THE COURT: You say you probably would not vote. I don't know whether that means you might be able to under certain circumstances or you might not under other circumstances.

PROSPECTIVE JUROR: Five years ago, I was a juror, and the same question. When I was examined whether I would be a proper juror, I was dismissed because the attorneys felt I would not be qualified.

THE COURT: Under the circumstances you feel you could not be fair and impartial because the death penalty mght [sic] be imposed?

PROSPECTIVE JUROR: I don't think I would be fair.

MR. RHODES: May I be heard?

(Whereupon the following proceedings were had at side bar out of the hearing of the jury.)

MR. RHODES: Your Honor, so far all he is saying is he has strong reservations concerning the death penalty. He has not stated any circumstances under which he would not impose the death penalty. Therefore we would request that he not be excused.

THE COURT: Mr. Hicks. Mr. Rhodes. I think I went into quite depth in reference to that. It is the opinion of this Court this man does not have the necessary qualifications and requirements to be impartial with reference to imposition or rendering a verdict in a case involving the death penalty.

I have noted your objection. I will overrule and dismiss him for cause.

Mr. Rhodes, when I make a decision, I think I am pretty thorough on what I am making it on, and I think I let in the proper criteria of establishing partiality, and his thoughts and beliefs were negative aspects of the death penalty.

Accordingly, it is the opinion of this Court, based uponmy [sic] own experience and responses made by this particular individual, that he not be allowable to stand as a juror in this case because of his statements.

MR. RHODES: I have no argument. The juror was very thorough very [sic] time you asked him. I don't think –

THE COURT: It is his way of answering. That is the reason I approached a little more depth. I thought he was being evasive and trying to find an excuse to be excused. But his explanation of prior situations and his thoughts on this matter brought me to but one conclusion. What he was stating was not evasive but truthfully stated the fact.

MR. HYNES: I ask, you could ask their names.

THE COURT: I don't have to. What for you want to know the names?

MR. HYNES: Just for record keeping purposes.

THE COURT: The files are here. You can get every name you want. It is not appropriate and proper for me to get their names on general voir dire.

MR. GAMBONEY: If they are not excused for cause, but they do make comments, it will be easier when we question them.

THE COURT: If everyone is excused for cause –

MR. GAMBONEY: Some may not, and then we wouldn't question them.

THE COURT: You know who they are. Look, I have never gone into that.

MR. HICKS: Our law clerk came in. Can she join us at counsel table?

THE COURT: Yes.

(Whereupon the following proceedings were had within the hearing of the prospective jurors.)

THE COURT: You are excused.

PROSPECTIVE JUROR: I don't believe I, as a human being, can take the life of another.

THE COURT: Ma'am, you understand you are not taking the life of anybody else? The purpose of a jury, as I said is twofold. Number one, to decide whether or not the defendant is guilty of the charges before the Court. Number two, you may or may not be required to make a statement whether or not you feel the death sentence should be imposed upon that individual.

It is not you that is taking the life of that particular individual. It is only you deciding whether or not a decision should be entered in that particular case. I know of no juror that has ever been responsible for anybody's life being taken away.

As a citizen, you have certain duties and obligations unless this infringes on your moral or religious convictions, which violate your own principals, then of course that situation is for this Court to make a determination.

But again people who say they don't want to take somebody else's life away from them, that is not the purpose of the juror. The juror is to make a decision based upon the law whether or not that person is guilty. I am being repetitious.

Number two, you may or may not be called upon to make a determination whether or not the death sentence should be imposed.

PROSPECTIVE JUROR: Morally I don't think I could make that decision.

THE COURT: On what basis?

PROSPECTIVE JUROR: That I could be one of them to decide a person is put to death. I couldn't do it.

THE COURT: Under no circumstances could you do this?

PROSPECTIVE JUROR: I don't believe I could, no.

THE COURT: If you were asked to do it, and you were required, do you think you could participate

and still give both sides a fair opportunity to resolve that issue?

PROSPECTIVE JUROR: No, I don't think so. No.

THE COURT: Thank you. You are excused.

Anybody else?

PROSPECTIVE JUROR: I understand what you are saying, your Honor, but morally I just don't think I could be responsible to make the decision whether or not a person even be considered be put to death.

THE COURT: I am not trying to be critical, and I am not trying to be impossible. You say "morally." You cannot be responsible for making that determination.

PROSPECTIVE JUROR: Yes, your Honor.

THE COURT: The moral basis for it is what? You just can't say "morally."

PROSPECTIVE JUROR: I just don't think I could live with myself if I was forced to make that kind of decision. Just the idea of a murder trial upsets me. When you first told us that, I started shaking inside. My God, what have I got myself into? When you started talking about the death sentence, I really panicked.

THE COURT: Again when I sit here and say something I am not being critical. It is not a question of what you got yourself into. Number one, you had no choice. It is not something you did voluntarily, and all of a sudden you were in this situation.

You were chosen, and as a citizen one of the privileges and obligations is to sit in judgment over your fellow man. When you say, what have you got yourself into, I don't like to hear that, because I don't think anybody would really volunteer their services for something of this kind; but they understand they have certain duties and obligations as citizens, and accordingly, they try to do the best they can. Certainly many of the things imposed upon us are not in our liking.

The question I asked is can you be fair and impartial and can you give the State and the defendant a fair trial.

PROSPECTIVE JUROR: If it was a matter of guilty or not guilty –

THE COURT: Well, it is not.

PROSPECTIVE JUROR: With that hanging over this particular case, I don't think I could.

THE COURT: I will excuse you. Anybody on this side? Yes, ma'am.

PROSPECTIVE JUROR: Well, I am Saintified myself. I don't believe in capital punishment.

THE COURT: What religious group is that?

PROSPECTIVE JUROR: Holiness.

THE COURT: Yes.

PROSPECTIVE JUROR: I don't think I could live with myself if I had to make that decision. That would rest on my conscience.

THE COURT: You have heard everything I have said. If I were to repeat all those things, you still could

not be fair and impartial, and you could not participate in the second phase of the proceedings?

PROSPECTIVE JUROR: Right.

THE COURT: You are excused.

PROSPECTIVE JUROR: Thank you.

THE COURT: The gentleman.

PROSPECTIVE JUROR: Yes. I feel the State has no right to take a life under circumstances without being able to vote or recommend the execution.

THE COURT: I don't follow you. What are you telling me?

PROSPECTIVE JUROR: That I would not, regardless of the evidence, I would not vote for the death penalty.

THE COURT: For what reason would you make that statement?

PROSPECTIVE JUROR: Because I don't think that is something the State should be doing or anybody else.

THE COURT: And based upon why?

PROSPECTIVE JUROR: That is moral conviction.

THE COURT: Do you belong to any religious group?

PROSPECTIVE JUROR: I am not an active member of any religious group.

THE COURT: You are excused, sir.

PROSPECTIVE JUROR: Based upon religious conviction I don't think I could be fair and impartial.

THE COURT: What is your religious connection?

PROSPECTIVE JUROR: Pentecostal Evangelical.

THE COURT: Based upon that, you could not render –

PROSPECTIVE JUROR: Not death.

THE COURT: If the fact was you were not required to make that decision, could you possibly sit and listen to the trial of the case?

PROSPECTIVE JUROR: Yes.

THE COURT: Because of the fact the death sentenced [sic] may be imposed and that determination is made by the jury, you feel you could not do this?

PROSPECTIVE JUROR: Correct.

THE COURT: Would you find the defendant not guilty even if you felt he was guilty, if you felt the death sentence could be imposed?

Would you, or wouldn't you?

PROSPECTIVE JUROR: I wouldn't. I just wouldn't vote it.

THE COURT: What?

PROSPECTIVE JUROR: I couldn't determine that, the fact whether he should have a death sentence or

not. I could say he is guilty or not guilty; but to impose the death sentence, I disagree with capital punishment because of religious beliefs.

THE COURT: You are excused, ma'am. Thank you. Anybody else? Yes, sir.

PROSPECTIVE JUROR: I could not rule, take a vote to the jury like that morally.

THE COURT: What nature of moral issues are you talking about?

PROSPECTIVE JUROR: About the death penalty.

THE COURT: I don't understand. That is what we are talking about. What is morally wrong with determining whether or not a particular individual should be given the death sentence?

PROSPECTIVE JUROR: Because of the sentence, I could – I do not believe in killing anybody. Never. I do not believe in killing animals or anybody.

THE COURT: What religious group do you belong to, if any?

PROSPECTIVE JUROR: I have studied all religions.

THE COURT: Do you have any you belong to or do you just study?

PROSPECTIVE JUROR: Not at the moment. I just study.

THE COURT: You are not saying this to get out of trying the case?

PROSPECTIVE JUROR: No, sir.

THE COURT: The fact that the death penalty would not be invoked, would you sit and listen to the case?

PROSPECTIVE JUROR: If the death penalty were not involved?

THE COURT: Yes, sir.

PROSPECTIVE JUROR: Yes.

THE COURT: But the fact you may be called upon to make that determination, you feel you could not do it?

prospective juror;[sic] No, sir, never.

THE COURT: You are excused, sir. Yes, sir.

PROSPECTIVE JUROR: I belong to Jehovah Witness. One belief is obstaining involvement in such as this. I ask the Court to dismiss on that basis.

THE COURT: Jehovah Witness say you are not supposed to get involved in a trial? Is that what the religion is?

PROSPECTIVE JUROR: That lead up in the courts and the people of the courts. We obstain from such involvement.

THE COURT: That is something new to me. I have never been aware of the fact any religious group was against participating if the fact is a death sentence were not to be imposed. Would that create any problems?

PROSPECTIVE JUROR: I don't think it has to do with the death sentence. Although I feel uncomfortable about it, that is one of our beliefs, to obstain from involvement.

THE COURT: Yes, sir.

PROSPECTIVE JUROR: I practice the Jewish Religion and in the Jewish Religion, our life is here. There is no other after life or whatever. We were brought up there is no eye for an eye or tooth for a tooth or anything of that nature. Capital punishment goes against my religious beliefs regarding that.

THE COURT: I am not amember [sic] of the Jewish faith, but I don't think that is a proper interpretation of what the Jewish faith is. There are other offshoots on it. I am not going to sit here and be critical.

Be that as it may, if you are required to sit as a juror, could you participate and make a determination following the law and instructions of the law the Court will give you?

PROSPECTIVE JUROR: Is the capital punishment part of it?

THE COURT: Yes, part of the case.

PROSPECTIVE JUROR: Not with it.

THE COURT: So, you would say if you were to remain, and I let you stay here, and you were asked to make that determination, you could not make a fair determination of that fact?

PROSPECTIVE JUROR: Not with capital punishment, no.

THE COURT: You are excused, sir.

PROSPECTIVE JUROR: I am morally against capital punishment.

THE COURT: Why?

PROSPECTIVE JUROR: It is my decision to choose whether or not this person is guilty, and he will get capital punishment whether I choose guilty or not guilty, I would vote against it because I am against capital.

THE COURT: What you are saying is even though he were guilty, you would find him not guilty?

PROSPECTIVE JUROR: If Ithought [sic] he was going to get capital punishment.

THE COURT: You are excused. Ma'am, thank you.

* * *

Okay, ladies and gentlemen, before I proceed with the questioning of prospective jurors, I feel in most cases, this is probably the first time you have been in a courtroom or participated in a jury trial, so that kind of scares you. I probably would be the same way if I were sitting in your shoes out there.

So, I feel I should take a few minutes of your time and my time to explain some basic fundamental principals of law, so you can readily understand what is happening in these proceedings. I don't expect you folks to be experts in the field. Many of us participate in the criminal justice system, and we are still learning, and we

have to learn by our mistakes and by other people assisting us in carrying out our duties here, and carrying out the duties are the principal parties involved in here.

These principals are only given to you, advising you of what is happening. These are not principals of law that you will have at the conclusion of the proceedings. They are only given to you to educate you on what is happening. The final instructions are given after a completion of the proceedings. After you have heard the evidence in court and testimony of the witnesses, then I will present to you propositions of law that you must follow in reaching your verdict in this case.

Now, the fact the defendant was indicted is only a means by which he is brought to trial. Under the law the defendant is presumed to be innocent of the charge against him, and this remains throughout the trial of the case and is only overcome after you have heard all the evidence, and closing arguments of the counsel, and been advised on the law by the Court, and you have been retired to the jury room, and after you have all unamiously [sic] agreed, then your decision will make a determination.

The Judge is the judge of the law, which means I will decide what law is to be presented in this case. I will decide any questions of law that may arise on the trial of these proceedings. You will and you can reach a verdict in this case.

As I said when we began these proceedings, these proceedings are broken down into two phases. First phase is only to consider whether or not the defendant is guilty or not guilty. The second phase, you may be required to render a decision whether or not the defendant qualifies for the imposition of the death sentence. And then you will be asked whether or not you feel a death sentence should be imposed. Accordingly, you must consider first things first. After that is concluded, then the Court will advise you further on what is to happen.

Primarily your function at the present time is after you are selected, upon the completion of all the questions asked of you, is to decide whether or not the defendant is guilty of the charges that are pending against him.

The jury determines questions of fact, which means you will decide the creditability of the witness, whether or not you will believe them, and what weight you are going to give to their testimony. And then upon completion, after you have heard all the evidence in this case, you will be required to decide the ultimate fact to be decided by jurors in this case.

If after you have heard all the evidence in this case and you are satisfied beyond a reasonable doubt that the State has met its burden, that the defendant is guilty of the charges pending against him, then you may or you must reach a verdict that he is guilty. If on the other hand you feel the State has failed to meet its burden, then the only verdict you can reach is that the defendant is not guilty of the charges before the Court.

From time to time the attorneys will object to various questions asked. You are not to hold the fact he objects to a particular question against him. It is necessary for him to do so for two reasons. It helps me in trying the case and keeps out irrelevant and immaterial matters. Again please don't hold this against an attorney for objecting to a question that is asked. He is only doing his job. Accordingly, I would criticize him if he didn't do his job properly. I will have no criticism because the People, the State, and the defense are competent individuals, and that question should not be considered or discussed further.

From time to time the jury will be excused because of certain things that arise during the progress of the trial of this case and/or there will be discussions outside of your presence, as you have seen.

Before we start preliminary propositions of law and before you are asked questions, the purpose of those particular hearings is to keep out matters that you do not need to concern yourselves with. You have enough of a job to do, and accordingly, I feel you shouldn't be burdened with propositions of law that you probably have no particular idea what the purpose is.

Again we are not trying to keep anything away from you. This function is only done to make your job a little easier.

Now, we have another problem. In this courtroom, ladies and gentlemen, I have quite an extensive court call, not counting the present case before the Court. Many times it is easy for me to sit here and say tomorrow morning we are starting at a particular time. All of a

sudden something comes up or certain matters arise I have not anticipated.

So then it becomes very difficult unequivocably that we start at that particular time. But ladies and gentlemen, this Court will do everything possible to start at a predetermined time that I indicated. If in fact I am not able to do so, and I see your time is being taken up, I will try to get word to you the reason why the delay is happening and to let you know when we will be able to proceed without too much further delay.

Again, do not hold it against me for not being accurate in my time.

I would like to indicate further it is my position that I do not like to work late in this courtroom. It is not that I don't like to. I feel most of you folks have families to go home to. You have other things to concern yourselves with, and accordingly I like to get you out at a reasonable period of time.

And further it assists attorneys so that the following day they are able to prepare whatever they need to prepare for the coming day, because of the fact they have enough time to take care of that, and we are not delayed in starting. Accordingly, that is another proposition.

Further it is my honest opinion although a lot of names were read, it is not that involved, which means it is not going to last for a prolonged period of time. I do like to move things without any unnecessary delay, and I like to move things without any underhandedness perpetrated by any party in here. You may not hear about it, but they will hear about it.

Because of that, I am going to question each prospective juror to determine his or her qualifications to act as jurors. I try not to ask any questions that will in any way embarrass an individual. The only questions I like to ask are questions that are appropriate and assist the attorneys in this case to decide whether ornot [sic] they would like to have you act as jurors.

Again you need not concern yourselves if you are excused. Most of you will think that is great. Be that as it may, I am sitting up here. I have tried many cases in this building and in this courtroom. I really can't tell you why a particular individual is excused. Because I sit here scratching my head, and my hair shows that particular situation. It takes an awful beating trying these cases and trying to find out why a particular individual is excused.

Be that as it may, each side has a right to excuse a certain number of individuals based upon certain restrictions. You need not concern yourselves.

Accordingly, that is a matter I bring up so you understand it is nothing against you individually. It is because the parties feel they would not like to have them act as jurors in this case.

From time to time you will be reminded not to discuss this case amongst yourselves. When you get home, if anyone should try to influence your decision in the case, please advise me so I can take appropriate steps.

I do not feel anything like that will happen, but again I would like you to advise me if any such thing occurred with reference to this matter.

Now, the procedure. The young lady with the green and white dress will be questioned first. After I have exhausted all the possible questions I feel appropriate for her, I will then move onto the gentleman immediately to her left. Finally satisfied with his answers, and there is no basis for excusing that individual, I will move to the gentleman in the rear row further away from me and question him.

And upon completion of him, the lady next to him, to his left, I will question her. Upon completion of her and there is no reason to excuse her, the State will decide whether or not they could act as jurors. If they are accepted, then the defense has an opportunity to make that determination.

If the defense seeks to excuse one of those particular jurors, that particular juror will be replaced by another juror. The vacated spot will be filled by sitting jurors. If that particular juror is excused will be determined by the defense, or whether or not they choose to have him. The State will make a decision whether or not the replaced juror should be excused. If both sides are in agreement, accordingly all four jurors are proper, they will be sworn in or they will commence awaiting instructions by the Court.

You know I talk pretty fast when I keep saying these things. I certainly don't want you to think I am trying to minimize the importance of any of these things. Anything this Court does is for a purpose because not only is it required by the law, but it assists all parties in this case to assist you to understand what is happening in this particular case.

The young lady in the front row doesn't know what questions I will ask. I will be repetitious. But be forewarned, I do not have any questions in front of me. I ask the questions as they occur to me. I jump around. Sometimes I get repetitious. That is only the sign of the times. And a person, when you get a little older, sometimes you get repetitious. I try not to do that. If I do, just smile to yourselves. It makes me feel badly I goof up.

I think I have taken enough of your time. I will commence questioning of the lady in the front row.

• • •

ALFRED KLEOSS,

prospective juror, having been duly sworn to answer questions on voir dire, testified as follows:

EXAMINATION

BY THE COURT:

Q Alfred Kloess [sic], K L E O S S.

Mr. Kleoss, do you still reside at the same address indicated here?

A Yes.

Q How long have you so resided?

A Thirty-three years.

Q You are married?

A Yes.

Q You are presently retired. What kind of work did you do?

A Phillips Petroleum in Indiana.

Q Your wife, what does she do?

A Retired.

Q When she worked, where did she work?

A Wieboldts.

Q You indicated you served on a jury before?

A Yes.

Q What type of case would that have been, if you remember?

A A case of rape.

Q Was that here?

A Yes.

Q How long ago?

A I believe it was '60 or '62.

Q The nature of that proceedings, would that create a problem for you in this case?

A No.

Q If you were selected as a juror, would that create a hardship for you?

A No.

Q Would you follow my instructions on the law even though you may not agree?

A Yes.

Q You have friends with the police Department?

A Not at the present time. I have a brother-in-law a police officer, but he is retired.

Q If a police officer were to testify, would you consider his testimony any greater than anybody else?

A No.

Q You have four children?

A Yes.

Q Oldest, boy?

A Yes.

Q Is he married?

A He lives in Texas and work [sic] for the park district?

A [sic] What does his wife do?

A His wife works for Arthur Anderson.

Q Next, boy, thirty-six, or girl?

A Boy.

Q Is he married?

A Yes.

Q What does he do for a living?

A He's a school teacher.

Q For what school?

A St. Andrews School in Park Ridge.

Q Do you know what grade he teaches?

A Yes.

Q What grade?

A Fifth grade.

Q His wife, what does she do?

A She is also a school teacher.

Q Does she teach elementary school as well?

A No. she [sic] did.

Q Next, thirty-one year old?

A Boy.

Q Married?

A Yes, he is.

Q What does he do for a living?

A Studying to be a Pastor.

Q Is he married?

A Yes.

Q What does his wife do?

A His wife is a school teacher.

Q She teaches elementary school?

A Elementary.

Q What grade?

A Second grade.

Q Next is thirty, the youngest. Boy or girl?

A Girl.

Q Is she married?

A Yes.

Q What does she do for a living?

A School teacher.

Q What does her husband do?

A Accountant.

Q Not for Arthur Anderson?

Have you or any member of your family ever been the victim of a crime?

A No, I haven't.

Q Have you ever been accused of a crime?

A No.

Q Do you know of any reason why you cannot be fair and impartial?

A Not at all.

Q The nature of the charges, does that create any problem for you?

A No.

Q Would you automatically vote against the death penalty no matter what the facts of the case were?

A No.

Q Would you follow my instructions on the law to be followed even though you may not agree to it?

A Yes.

Q You may be required to sign a guilty verdict. Will you sign such a verdict?

A Yes.

Q On the other hand if not guilty were the proper verdict, would you sign such a verdict of not guilty?

A Yes.

Q You don't have any quarrel with the fact the defendant does not have to do anything; the State must prove him guilty beyond a reasonable doubt?

A No.

Q The fact a handgun was alleged to have been used, does that create any problem for you?

A No.

Q If you are selected to act as a juror, would that create a hardship for you?

A No.

Q Do you have any hobbies?

A Collect miniature cars.

Q You subscribe to any periodicals or publications?

A Yes, I do.

Q Tell me about it.

A Life Magazine, Readers Digest, National Geographic, and Sports Magazine.

Q And you feel you could give both sides a fair trial in this case?

A Yes.

MARY MORROW,

prospective juror, having been duly sworn to answer questions on the voirdire [sic], testified as follows:

EXAMINATION

BY THE COURT:

Q Would you state yourname [sic] and spell your last name?

A Mary Morrow, M O R R O W.

Q That is Mrs. Morrow. You are divorced?

A Yes.

Q You are still residing at the address indicated here?

A Yes.

Q How long have you so resided?

A Twenty-seven years.

Q You have never served on a jury before?

A No.

Q Are you scared too [sic]?

A No, I am not afraid.

Q You are presently employed by whom, and what do you do?

A Dee Dee Communications. I am an inspector.

Q Your former husband, what did he do?

A He worked for United Airlines.

Q You have two children, oldest being thirty-three. Boy or girl?

A Two girls.

Q Are they married?

A No.

Q Are they employed?

A Yes.

Q The oldest, what does she do?

A She is a nurse's aid.

Q The twenty-nine year old?

A Nurse's aid. They are both nurse's aids.

Q You have friends or relatives in the Police Department or State's Attorney's Office?

A No.

Q Would you automatically vote against the death penalty no matter what the facts of the case were?

A Yes.

Q You would?

A No.

Q You understand ma'am there are two phases to this proceedings [sic]?

A Yes.

Q Does that create any problems for you?

A No.

Q Now, if you were required to sign a guilty verdict, would you sign such a verdict?

A Yes.

Q If on the other hand, a not guilty verdict would be a proper verdict, would you sign such a verdict?

A Yes.

Q Have you or any member of your family ever been the victim of a crime?

A No.

Q Have you or any member of your family ever been accused of a crime?

A No.

Q Do you have friends or relatives in the Police Department, State's Attorney's Office, or any law enforcement agency?

A No.

Q If a police officer were to testify, would you consider his testimony greater than anybody else?

A No.

Q The fact a handgun was used in the commission of the act, does that create any problem for you?

A No.

Q The nature of the charges, does that create problems for you?

A No.

Q You would follow the instructions the Court gives you with reference to the law even though you may not agree to it?

A Yes.

Q Do you have any hobbies, ma'am?

A Yes, bowling.

Q Do you subscribe to periodicals and publications?

A Ebony and Jet.

Q If the defendant chose not to testify, would you hold that against him?

A No.

THE COURT: Did I ask you that? If the defendant chose not to testify, would you hold that against him?

PROSPECTIVE JUROR KLEOSS: No.

THE COURT: You feel you could give both sides a fair trial?

PROSPECTIVE JUROR MORROW: Yes.

MR. GAMBONEY: With thanks, the People would excuse Miss Utley and Mr. Malin.

THE COURT: Would you folks all move down please.

THE CLERK: Pearline McGee. Thelma Williams. Edna Pleger.

HELEN ZEBER,

prospective juror, having been duly sworn to answer questions on the voir dire, testified as follows:

EXAMINATION

BY THE COURT:

Q The lady in the front row, further away, would you state your.name?

A Helen Zeber, Z E B E R.

Q That is Miss Zeber. Are you still residing at the same address indicated?

A Yes.

Q How long have you so resided?

A About twenty-two years.

Q You never served on a jury before?

A No.

Q You are retired, is that right?

A Yes.

Q When you were working, what kind of work did you do?

A Bookkeeper.

Q For whom?

A Chicago Stadium.

Q Do you have one of your parents living at this time?

A No.

Q When your father was alive, what kind of work did he do?

A Engineer, Water Works, Luttington, Michigan.

Q Your mother?

A Housewife.

Q You have brothers or sisters?

A No.

Q You have never served on a jury before?

A That is right.

Q Many of these things are rather strange to you, to say the least?

You have friends or relatives on the Police Department, in the State's Attorney's office, or any law enforcement agency?

A No.

Q If a police officer were to testify in this case, would you consider his testimony any greater than anyone else?

A No.

Q You don't feel they are more trustworthy?

A No.

Q The nature of the charges before the Court, does that create any problem for you?

A A little bit.

Q What kind of problem would that be?

A Well, very serious.

Q Yes, ma'am. I understand that. Would that effect [sic] your rendering a decision in this case?

A No.

Q Would you be fair and impartial?

A Yes.

Q Would you automatically vote against the death penalty no matter what the facts of this case were, assuming you were required to make that determination?

A Yes.

Q You would?

A Oh, I am sure no.

Q I am sorry. The way it is worded it might confuse you. So you feel you could participate in both phases if required to do so and give both sides fair consideration?

A Yes.

Q Have you or any member of your family ever been the victim of a crime?

A I have had a purse snatching and my apartment has been burglarized.

Q Did they ever get the party or parties who perpetrated those acts?

A No.

Q You have never been the accused, complainant, or witness in a criminal case?

You have never been accused of a crime?

A No.

Q Have you ever been a witness in a criminal case?

A I was a witness in the William Scott –

A Character witness?

A Yes.

Q That wouldn't effect your rendering a decision in this case?

A No.

Q The nature of the charges create a difficulty but not an unsurmountable difficulty, is that right?

A Yes.

Q You have any problems with the proposition the State must prove the defendant guilty beyond a reasonable doubt, and that the defendant need not do anything?

A No.

Q Accordingly, you may be required to sign a guilty verdict. If it were a proper verdict, would you sign such a verdict?

A Yes.

Q If on the other hand a not guilty verdict is the proper verdict, would you sign such a verdict?

A Yes.

Q If the defendant chose not to testify, would you hold that against him?

A No.

Q Would you follow my instructions on the law in this case even though you may not agree with them?

A Yes.

Q If you were selected as a juror, would that create a hardship for you?

A No.

Q You have any hobbies?

A Oh, yes, I knit, knitting and sewing, and biking and hiking.

Q Do you subscribe to periodicals and publications?

A Not at this time.

Q You feel you could give both sides a fair trial, is that right?

A Yes.

Q The fact a handgun may have been used in the case, would that create any problem for you?

A No.

Q Accordingly, you feel you could give this defendant a fair trial, right?

A Yes.

* * *

THE COURT: Gentlemen.

MR. GAMBONEY: Your Honor, the People will accept and tender this panel.

THE COURT: Defense.

MR. RHODES: May we be heard?

THE COURT: Yes.

(Whereupon the following proceedings were had at side bar out of the hearing of the prospective jurors.)

THE COURT: Go ahead.

MR. RHODES: Your Honor, we will be requesting all prospective jurors be asked the following: If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?

THE COURT: Mr. Rhodes, your request is noted. I have asked the question in a different vain substantially in that nature. Your request is denied.

Mr. Rhodes, if I may, for your education and edification as well as the State, matters that were presented before the jurors who sat in the box will be the same as they were asked each individually, except the law does not require certain procedures of questioning.

This Court is under the impression and the record will reflect that the proper questions are being asked of them as required. Accordingly, for you to ask me to ask certain questions that have been asked in a different vain, not using the exact language, are not acceptable questions. Thank you.

* * *

ETHELINDA THOMAS,

prospective juror, having been duly sworn to answer questions on the voir dire, testified as follows:

EXAMINATION

BY THE COURT:

Q This is Mrs. Thomas, is that right?

A Yes.

Q "Ethelinda," is that two names?

A It is together, one name. You can call me "Linda" please.

Q I will call you "Mrs. Thomas" and accord you all the courtesies and niceties I have the others.

Are you still residing at the same address indicated?

A Yes.

Q How long have you so resided?

A Nine years.

Q You are married, is that right?

A Yes.

Q Who do you work for, and what do you do?

A University of Chicago, Conference Coordinator, Continuing Medical Education.

Q Your husband, what does he do?

A He is self-employed.

Q What is his business or profession?

A Home maintenance.

Q You have three children. Oldest, twenty. Boy or girl?

A Girl. She is a student but working this summer.

Q Where is she going to school, and what is she studying?

A She goes to I. S. U., studying sports medicine.

Q What does she work for now?

A Law firm downtown.

Q What type of law firm? What kind of law are they involved in?

A Jacquel (Phonetic Spelling) and Kaiser. I am not sure. She is in the library.

Q So that position would not in any way effect your rendering a decision if you are called upon in this case?

A No, it wouldn't.

Q You have an offspring eighteen?

A She is going to Eastern. She is working this summer at Carson's.

Q What is she studying at Eastern?

A She hasn't got a major.

Q Fifteen year old?

A He is a student.

Q At home?

A Yes.

Q Do you have any friends or relatives in the Police Department, State's Attorney's office, or any law enforcement agency?

A No.

Q If a police officer were to testify, would you consider his testimony any greater than anybody else?

A No.

Q You have indicated that you have some friend or immediate acquaintance that is a lawyer?

A Brother-in-law.

Q What kind of law is he practicing?

A I don't know.

Q You don't remember discussing his business with him?

A No.

Q Have you or any member of your family ever been the victim of a crime?

A Yes.

Q What?

A We had an automobile stolen and never replaced and never found.

Q Have you or any member of your family ever been accused of a crime?

A No.

Q You are a party to a lawsuit, is that right?

A No.

Q It says has any member of your family ever been a party to a lawsuit?

A My mother-in-law was hit and run over.

Q She filed a civil suit?

A Yes.

Q That wouldn't effect you in this case?

A No.

Q If a police officer were to testify, would you consider his testimony any greater than anyone else?

A No.

Q The fact that a handgun might have been used in the commission of the act, does that create any problem for you?

A No.

Q Would you automatically vote against the death penalty no matter what the facts of this case were?

A No.

Q Do you feel you could give both sides a fair trial?

A Yes.

Q Does the nature of the charge create any problem for you?

A Generally, but I think I could be fair.

Q You could overcome that and follow my instructions on the case even though you may not agree to it?

A Yes.

Q Accordingly if you were required to sign a guilty verdict, would you sign such a verdict?

A Yes.

Q If on the other hand a not guilty verdict were proper, would you sign such a ct?

A Yes.

Q You have any problem with the proposition that the State must prove the defendant guilty beyond a reasonable doubt, and the defendant does not have to prove anything?

A No.

Q If the defendant chose not to testify, would you hold that against him?

A No.

Q You know any reason why you cannot be fair and impartial?

A No.

Q If you are selected as a juror, would that create a hardship for you?

A No.

Q Do you have any hobbies?

A Yes.

Q Tell me about them.

A Gardening, and I grow vegetables.

Q It is work.

A It is cheaper.

Q You subscribe to any periodicals or publications?

A Reader's Digest.

Q If the defendant chose not to testify, you wouldn't hold it against him?

A No.

Q You don't have any problem with the proposition the State must prove the defendant guilty beyond a reasonable doubt, and the defendant need not prove anything?

A No.

* * *

ROSANNE WURSTER,

prospective juror, having been duly sworn to answer questions on the voir dire, testified as follows:

EXAMINATION

BY THE COURT:

Q Ma'am, would you state your name for the record and spell your last name for me?

A Rosanne Wurster, W U R S T E R.

Q Yes, ma'am. That is Miss Wurster?

A Correct.

Q You are still residing at the same address indicated here?

A Yes.

Q How long have you so resided?

A Four years.

Q Prior to that time, what general area did you live in?

A Itasca.

Q You are single?

A Right.

Q You never served on a jury?

A No.

Q Who do you work for and what do you do?

A I work for Warner Lambert. Shipping and receiving clerk.

Q Are your parents alive?

A My mother.

Q What type of work does your mother do if she works?

A She works for Arbor Management as a manager of a small business account, cafeteria.

Q When your father was alive, what type of work did he do?

A Machinist.

Q You have any brothers or sisters?

A I have two brothers.

Q Are they married?

A One is.

Q What does he do for a living?

A Machinist.

Q What does his wife do?

A I have no idea.

Q The single brother, what does he do for a living?

A Puts up gutters and siding.

Q You have never served on a jury before?

A That is correct.

Q Now, if a police officer were to testify in this case, would you consider his testimony above anybody else?

A No.

Q You don't have any friends or relatives in the Police Department, State's Attorney's office, or in any law enforcement agency?

A No.

Q Have you or any member of your family ever been the victim of a crime?

A My parents' house was robbed four years ago.

Q Did they ever get the party or perpetrators?

A No.

Q Does the nature of the charge create any difficulty for you?

A No.

Q If you are selected to act as a juror, would that create any hardship for you?

A No.

Q Have you or any member of your family ever been accused of a crime?

A Yes.

Q Would you come into my chambers, please. Court reporter.

(Whereupon the following proceedings were held out of the hearing and presence of the prospective jurors.)

THE COURT: The question I asked is whether or not any member of your family has ever been accused of a crime.

Can you tell me about that?

THE WITNESS: My younger brother was accused of armed robbery.

THE COURT: He went to jail?

THE WITNESS: Yes.

THE COURT: Is he presently in jail?

THE WITNESS: No. He is out.

THE COURT: Would that effect your rendering a decision in this case?

THE WITNESS: No.

THE COURT: How was the armed robbery performed, if you know?

THE WITNESS: I have no idea.

THE COURT: Was a handgun used?

THE WITNESS: I don't know.

THE COURT: You have no knowledge?

THE WITNESS: No.

THE COURT: Is he your younger brother?

THE WITNESS: Yes.

THE COURT: How old was he when it happened?

THE WITNESS: Seventeen.

THE COURT: What is he doing now?

THE WITNESS: He does gutters and sidings.

THE COURT: Gentlemen?

MR. HYNES: Nothing.

THE COURT: We just wanted to know about it. It is none of their business. You go back out there. I will continue questioning you. I will be out there in a minute.

The way it is going right now, I am going to let these people in there go home and finish picking the jury.

(Whereupon the following proceedings were had within the hearing and presence of the prospective jurors.)

THE CLERK: Letitia Wilder. William Nehring. Judith Hoch.

THE COURT: Q Well, young lady, if I can resume where I stopped. The fact that a handgun may have been used and involved here, does that create any problems for you?

THE WITNESS: A No.

Q Would you automatically vote against the death penalty no matter what the facts of the case were?

A No.

Q The nature of the charge, does that create any problems for you?

A No.

Q If you were selected as a juror, would that create any hardship for you?

A No.

Q You would follow my instructions on the law even if you didn't agree to it?

A Yes.

Q Do you know any reason why you can't give both sides a fair trial on this case?

A No.

Q You don't have any quarrel with the proposition the State must prove the defendant guilty beyond a reasonable doubt and the defendant need not prove anything?

A No, sir.

Q If the defendant chose not to testify, would you hold that against him?

A No.

Q Would you sign a guilty verdict if that be the proper verdict?

A Yes.

Q If on the other hand a not guilty verdict were proper, would you hesitate signing that?

A No.

Q You have any hobbies?

A Needlepoint, crocheting, reading.

Q You subscribe to any periodicals and publications?

A Working Woman and Redbook.

Q You wouldn't have any problems with reference to trying this case if you were required to do so?

A That is right.

Q Thank you.

* * *

BETTY RITCHIE,

prospective juror, having been duly sworn to answer questions on the voir dire, testified as follows:

EXAMINATION

BY THE COURT:

Q State your name and spell your last name.

A Betty Ritchie, R I T C H I E.

Q That is Mrs. Ritchie, is that right?

A Yes.

Q You are still residing at the same address indicated here?

A Yes.

Q How long have you so resided?

A Almost five years.

Q Prior, where did you live?

A Cicero.

Q You are married?

A Yes.

Q What does your husband do for a living?

A He isn't working.

Q What kind of work did he do?

A Kitchen Aid diswasher [sic] repairman.

Q What type of work do you do?

A I work for Hart Schaffner, secretary to chief financial officer.

Q You have two children. Oldest is thirty. Boy or girl?

A Girl.

Q Is she married?

A No.

Q Is she employed?

A Executive with Residential Homes.

Q The twenty-nine year old. Boy or girl?

A Girl.

Q Is she employed?

A She is laid off, not working.

Q What typeof [sic] work did she do?

A In the First National Bank, in the mail room.

Q You have never served on a jury before?

A No.

Q You have friends or relatives in the Police Department, State's Attorney's Office, or in any law enforcement agency?

A No.

Q If a police officer were to testify, would you consider his testimony any greater than anybody else?

A No.

Q The nature of the charges create any problem for you?

A No.

Q The fact that a handgun may have been used, does that create any problem for you?

A No.

Q If you are selected as a juror, would that create any hardship for you?

A Just my boss.

Q Your boss would miss you. What happens if you are incapacitated? Hopefully it never happens. You feel that wouldn't effect you in any way?

A No.

Q Would you automatically vote against the death penalty no matter what the facts of the case is [sic] all about?

A No.

Q Have you or any member of your family ever been the victim of a crime?

A My husband had a car stolen.

Q Did you ever get the party who did that?

A No.

Q Have you or any member of your family ever been accused of a crime?

A No.

Q You have been a party to a civil law suite [sic]?

A Divorce case.

Q That wouldn't effect you rendering your decision in this case?

A No.

Q Would you follow my instructions even though you do not agree to it?

A Yes.

Q If the defendant chose not to testify, would you hold that against him?

A No.

Q The fact that a handgun was used, would that create problems for you?

A No.

Q You don't have any quarrel with the proposition that the State must prove the defendant guilty beyond a reasonable doubt and the defendant need not prove anything to you?

A No.

Q You have any hobbies?

A Crossword puzzles and reading.

Q You subscribe to any periodicals and publications?

A Psychology, and Insight On The News, and Science Digest.

Q You feel you could give both sides a fair trial?

A Yes.

* * *

YOLANDA FARINELLA,

prospective juror, having been duly sworn to answer questions on the voir dire, testified as follows:

EXAMINATION

BY THE COURT:

Q Ma'am, would you state your name and spell your last name?

A Yolanda Farinella, F A R I N E L L A.

Q Mrs. Farinella, is that right?

A Yes.

Q You are still residing at the same address indicated here?

A Yes.

Q How long have you so resided?

A Twenty-two years.

Q You never served on a jury before?

A No.

Q You are married?

A Yes.

Q Presently a housewife?

A Yes.

Q Did you ever work ma'am?

A About twenty years ago. I just graduated from Triton, Associate's Degree, Subtance [sic] Abuse. I am going for certification, board test, the end of July.

Q You have a career.

Your husband is retired?

A Yes.

Q What type of work did he do?

A He was in the printing business.

Q You have three children. Twenty-seven year old, boy or girl?

A Girl.

Q Is she married?

A Yes.

Q Is she employed?

A No.

Q What does her husband do?

A Banker for the Chicago National Bank.

Q What does she do?

A Housewife.

Q Twenty-three year old, boy or girl?

A Boy. He goes to DePaul University. He is studying Finance.

Q He is not married?

A Not married.

Q Twenty-two year old?

A Single and works in an office.

Q What kind of office would that be?

A Wood Bench (Phonetic Spelling) Advertisement.

Q You have never been a part of a jury?

A No, sir.

Q You have any friends or relatives in he [sic] Police Department, State's Attorney's Office, or any law enforcement agency?

A I have a nephew on the DuPage Police Force.

Q If a police officer were to testify, would you consider his testimony greater than anybody else?

A No.

Q You don't feel they are more trustworthy than anybody else?

A No.

Q Have you or any member of your family ever been a victim of a crime?

A No.

Q Have you or any member of your family ever been accused of a crime?

A No.

Q Do you know of any reason why you cannot give this defendant a fair trial?

A No, sir.

Q The fact a handgun was used in the commission of the act, does that create any problem for you?

A No.

Q The nature of the charges create any problem for you?

A No.

Q Would you automatically vote against the death penalty no matter what the facts of the case are?

A No, sir.

Q If you are selected as a juror, would that create a hardship for you?

A No.

Q Would you follow my instructions on the law even though you may not agree?

A Yes.

Q Accordingly you may be required to sign a guilty verdict. Would you sign such a verdict?

A Yes.

Q If on the other hand a not guilty verdict would be a proper verdict, would you sign cuch [sic] a verdict?

A Yes, sir.

Q You have any quarrel with the proposition the State must prove the defendant guilty beyond a reasonable doubt, and the defendant need not prove anything?

A No, sir.

Q If the defendant chose not to testify, would you hold that against him?

A No.

Q You have any hobbies?

A Tennis.

Q You subscribe to any periodicals and publications?

A No.

Q You feel you can give each side a fair trial?

A Yes.

* * *

ROBERT HINCHLEY,

prospective juror, having been duly sworn to answer questions on the voir dire, testified as follows:

EXAMINATION

BY THE COURT:

Q Would you state your name and spell your last name?

A Robert Hinchley, H I N C H L E Y.

Q Mr. Hinchley, you are single, is that right?

A Yes.

Q How long have you lived at the address indicated here?

A Twenty-five years.

Q You have never served on a jury before, have you?

A No.

Q Who do you work for and what do you do?

A I work for St. Paul Federal, programmer and analyst.

Q Your parents are alive?

A Yes.

Q What does your father do?

A He is a consultant.

Q For whom?

A St. Paul Federal.

Q Consulting with reference –

A Programmers.

Q What does your mother do?

A My mother did work.

Q Does she work now?

A Not as long as I remember.

Q You have a brother and sister?

A Brother and sister.

Q Is he married?

A He goes to school.

Q Is he employed?

A He is a student.

Q Where is he going to school?

A Illinois State.

Q Do you know what he is studying?

A I believe it is Finance.

Q Your sister, is she married?

A Yes.

Q What does she do for a living?

A She is not employed.

Q What about her husband?

A Salesman.

Q Do you have friends or relatives in the Police Department, State's Attorney's Office, or in any law enforcement agency?

A No.

Q If a police officer were to testify, would you consider his testimony any greater than anybody else?

A No.

Q Have you or any member of your family ever been the victim of a crime?

A Garage broken into.

Q Have you or any member of your family ever been accused of a crime?

A No.

Q Do you know of any reason why you cannot give this defendant a fair trial?

A No.

Q Do you have relatives or friends in the State's Attorney's Office or in any other law enforcement agency?

A No.

Q If a police officer were to testify, would you consider his testimony any greater than anyone else?

A No.

Q Knowing the nature of the charges, does that create any problem for you?

A No problem.

Q The fact a handgun was used, does that create any difficulty for you?

A No.

Q Would you automatically vote against the death penalty no matter what the facts of the case were?

A No.

Q If you are selected to act as a juror, would that create any hardship for you?

A No.

Q Would you follow my instructions on the law even though you do not agree?

A Yes.

Q Accordingly, you may be required to sign a guilty verdict, would you sign such a verdict?

A Yes.

Q If on the other hand a not guilty verdict were required, would you sign such a verdict?

A Yes.

Q If the defendant chose not to testify in this case, would you hold that against him?

A No.

Q I believe I asked you the fact that a handgun was used would that create a problem for you?

A No.

Q Do you have hobbies?

A Basketball and fishing.

Q Do you subscribe to any periodicals or publications?

A No.

Q Do you feel you can give both sides a fair trial?

A Yes, sir.

* * *

(Whereupon a panel of four jurors were sworn to try the issues.)

* * *

EXAMINATION BY THE COURT:

Q Sir, would you state your name and spell your last name?

A Benjamin Dexter, D E X T E R.

Q What is your name again?

A Benjamin Dexter.

Q You are still in the active file. I apologize for putting you in the inactive file. Don't let that mean anything.

You are still residing at the same address indicated here?

A Yes.

Q How long have you so resided?

A One year.

Q Prior to that, where did you reside?

A Same neighborhood.

Q You are single. Where do you work?

A Park Salon.

Q Are your parents alive?

A Yes.

Q What does your father do?

A He is disabled.

Q When he was working, what type of work did he do?

A It was before I was born.

Q What does your mother do?

A Housewife.

Q Did she ever work?

A No.

Q Do you have any brothers or sisters?

A One of each.

Q Tell me about them. Are they married and what do they do for a living?

A My brother is married. He is manager of Semille House (Phonetic Spelling). My sister is in nursing administration.

Q What does your sister's husband do?

A Manages Osco.

Q Do you have any friends or relatives who [sic] in the Police Department, State's Attorney's Office, or any law enforcement agency?

A No.

Q If a police officer were to testify would you consider his testimony greater than anybody else?

A No.

Q You don't feel they are more trustworthy than anybody else, do you?

A No.

Q The nature of the charges, do they create any problem for you?

A No.

Q Would you automatically vote against the death penalty no matter what the facts of the case revealed?

A Yes.

Q Would you follow my instructions on the law in the case even though you might not agree?

A Yes.

Q Do you know any reason why you cannot give this defendant a fair trial?

A I would have no problem during the trial. If it came – I had a friend's parents murdered twelve years

ago before capital punishment. I would give a fair trial. If he is found guilty, I would want him hung.

Q You couldn't be fair and impartial throughout the proceedings?

A No.

Q You are excused.

• • •

WANDA DAVIS,

prospective juror, having been duly sworn to answer questions on the voir dire, testified as follows:

EXAMINATION BY THE COURT:

Q Would you state your name and spell your last name?

A Wanda Davis, D A V I S.

Q That is Mrs. You are divorced, is that right?

A Yes.

Q Are you still residing at the same address indicated here?

A Yes.

Q How long have you resided there?

A Sixteen years.

Q You never served on a jury before, have you?

A No.

Q Who do you work for and what do you do for them?

A Oak Forest, hospital medical records.

Q Your husband, what did he do?

A He was in the Army.

Q Do you know what part of the Army?

A No.

Q You have three children. Oldest thirty. Boy or girl?

A Boy.

Q Is he married?

A Yes.

Q What does he do for a living?

A Army.

Q What does his wife do?

A She is a nurse.

Q Twenty-eight year old?

A He is living at home. He is not working.

Q He hasn't worked?

A He went in service and since he came out –

Q Do you know what branch of the service he was in?

A Marine.

Q Twenty-two year old, boy or girl?

A Girl.

Q Is she married?

A No.

Q Is she employed?

A Yes.

Q What does she do?

A Switchboard operator.

Q Do you have any friends or relatives in the Police Department, State's Attorney's Office, or any law enforcement agency?

A No.

Q If a police officer testified in this case, would you consider his testimony above anybody else?

A No.

Q You don't think they are more trustworthy than anybody else, do you?

A No.

Q Have you or any member of your family ever been the victim of a crime?

A No.

Q Have you ever been accused of a crime?

A No.

Q Do you know of any reason why you can't give both sides a fair trial?

A No.

Q The fact there was a handgun used, would that create any problems for you?

A No.

Q Would you automatically vote against the death penalty no matter what the facts were?

A No.

Q If the defendant chose not to testify, would you hold that against him?

A No.

Q Do you know any reason why you cannot give this defendant a fair trial?

A No.

Q Have you or any member of your family ever been the victim of a crime?

A No.

Q Have you or any member of your family ever been accused of a crime?

A No.

Q You were a party to a law suite [sic]?

A Workman's Compensation.

Q You don't have any quarrel with the proposition the State must prove the defendant guilty beyond a reasonable doubt and the defendant need not prove anything, do you?

A No.

Q You have hobbies?

A Swimming, skating, reading.

Q Do you subscribe to any periodicals or publications?

A No.

Q You feel you could give both sides a fair trial?

A Yes.

* * *

THE COURT: I guess you think this is kind of unusual for just 11 individuals to be here and what have you.

For your information and, for the record, I would like to advise that the case pending before the Court is a case of the People of the State of Illinois versus Derrick Morgan.

The nature of the charge, the defendant is charged with on or about December 17 of 1985, with committing the offense of murder, in that he, without lawful justification, intentionally and knowingly shot and killed David Smith with a handgun, in violation of the State statute.

He is also charged with on the same date, time, and place committing the offense of murder, in that he, without lawful justification, shot and killed David Smith with a handgun knowing that such shooting with a handgun created a strong probability of death or great bodily harm to David Smith, all in violation of the State statute.

That the matter before the Court, the State is elected to consider and ask that this case be tried as a capital

case, which means that the proceedings that are pending before the Court will result in two phases.

The first phase will be for the jury to decide whether or not the defendant is guilty of the charges pending before this Court.

If the defendant – if the jury finds that the defendant is guilty of those charges, then a second phase comes into operation, namely, the jury might be requested to determine whether or not the defendant qualifies for the imposition of a death sentence, and if they find that he does qualify, then, accordingly, another subsection of the second phase, namely, to determine whether or not the death sentence should be invoked upon the defendant herein.

Now, ladies and gentlemen, we have selected 10 jurors already. So, what remains is the selection of two additional jurors who will – who will constitute the 12 jurors that are required to try the case. In addition to that, two alternate jurors will be selected.

Now, for purpose of the record, I would like to indicate that the State is represented by assistant state's attorneys, Jack Hynes and William Gamboney, who are present before me.

* * *

Do you have any moral or religious conviction against the imposition of the death penalty so strong that you would be unable, without violating your own principle, to vote – to vote to recommend a death – not to recommend a death penalty regardless of the facts in the case? Okay?

The gentleman in the front row, would you explain the reason why you say that, sir?

A. I – well, what you are asking is if I would be on a case where if I were to impose a death penalty on somebody?

THE COURT: What I'm asking you, sir, if the situation exists whereby it will be required for the jury to decide whether or not a death sentence should be invoked, I'm asking you whether you have religious and moral convictions again the imposition of the death sentence?

A. Yes.

Q. Can you explain them, please?

A. I don't think anybody beyond – I don't – you know, I don't think that if there's one death, I don't think it is the right of the State or anybody else to cause another death.

Q. Why do you make that statement? What's the basis of it?

A. I guess you could say religious and conscientious.

Q. Religious and what?

A. And my own – my own personal feelings.

Q. Okay. What is your name, sir?

A. Thomas Wraight.

THE COURT: Sir, you are excused. The check will be – do you want to send him back downstairs?

THE SHERIFF: Yes.

THE COURT:

Q. Thank you. Here is his card. Anybody else that raised his hand. Yes, ma'am? The lady here?

A. I, basically – I believe –

Q. What?

A. Basically, a religious belief that no one other than God has the right to decide.

Q. What form of religion would that be?

A. I'm just Catholic, but – I that's how I feel.

Q. You feel that you couldn't, if required to do so, you wouldn't be able to invoke – to have the death sentence to be had?

A. No.

Q. What you are saying is because of the fact that the death sentence might be imposed, you would find the defendant not guilty only because of the fact that you would have to give a death sentence, is that what you are saying?

A. Not necessarily not guilty, but I know I couldn't impose a death penalty.

Q. I didn't hear you. You have to speak up.

A. I couldn't impose the death penalty.

Q. You mean you couldn't recommend that a death sentence be given?

A. Right.

Q. Okay. What is your name, please?

A. Susan Kelly.

Q. Okay. You may – you may leave. You have to return back to the jury room, okay? Who else?

MR. RHODES: Your Honor? Excuse me. May we be heard?

THE COURT: Yes.

(The following proceedings were had out of the hearing and presence of the prospective jurors:)

THE COURT: Yes, Mr. Rhodes.

MR. RHODES: For the record –

THE COURT: I understand that. I know.

MR. RHODES: Your Honor, the last individual, Susan Kelly, indicated she would have no problem with the guilt/innocence phase of the proceedings.

THE COURT: Hmm, hmm.

MR. RHODES: Her only objection was to the compounding, if it got to a sentencing stage.

THE COURT: Hmm, hmm.

MR. RHODES: We would object to her being excused for cause on that basis. We would also be objecting to the Court's – when she said imposing the death penalty, the Court said recommending.

I would like to make an objection from yesterday as well to that because the Supreme Court has addressed

that issue and held that it was error for the state's attorney to argue that the jury only recommends because the jury, if they vote to impose death, they are voting to impose death. They are not recommending it.

THE COURT: Mr. – Mr. – Mr. Rhodes, I'm not going to get involved in semantics. I believe – I am satisfied based upon her statement herein, number one, that she felt that she could not be a party to proceedings whereby there would be the death sentence, and I'm just not paraphrasing her statement, but I'm using what I interpret what her meaning of her statement was, and I'm satisfied that she would be disqualified because of her position, and I will note your objection and overrule it, okay?

MR. RHODES: Can I make a formal motion, Judge?

THE COURT: Yes, go ahead.

MR. RHODES: I move, firstly, for a mistrial, from yesterday and today, and my second motion is that these jurors here be instructed that if they vote to impose the death penalty, their vote is to impose it and it is not – not merely a recommendation.

THE COURT: Number one, Mr. Rhodes, I will not accept any motions for – with reference to the other panel that was had. You certainly had an ample opportunity to raise that point yesterday before adjournment.

Accordingly, I'm summarily denying it. With reference to this panel, I do not believe that they were anyway polluted, for purposes of better phraseology, or in any

way impressed or – or – whereby they could not participate in further voir dire by this Court. Thank you.

MR. RHODES: Thank you, Judge.

(The following proceedings were had in the hearing and the presence of the prospective jurors:)

THE COURT:

Q. There was one other person. Okay. Ma'am, you indicated further that you could not recommend – recommend that a death sentence be imposed on a defendant if required to do so. Why?

A. Right. I'm a Christian, and I don't believe it is my right to – to make any decision whether – on another person's life.

Q. Of course, under the – under the – under the prevailing decisions and what have you, I'm kind of limited to make any comments with reference to your particular position.

Accordingly, based upon your statement herein, I will excuse you, ma'am. You will be returned back to the jury room to be used in, perhaps, another case. What is your name, please?

* * *

MARK ARMGARDT,

called as a prospective juror, having been first sworn, answered questions as follows:

EXAMINATION BY THE COURT:

Q. What is your name, sir?

A. Mark Armgardt, A-r-m-g-a-r-d-t.

Q. Still living at this address?

A. Yes.

Q. You are single, is that right?

A. Yes.

THE COURT: Do you want to see about getting – sheriff?

THE SHERIFF: Yeah.

THE COURT:

Q. You are single. You never served on a jury before, did you?

A. No.

Q. You heard the questions I asked of the other prospective jurors. If I were to ask the same questions to you, would you have any problem with any particular one of them?

A. No.

Q. Okay. We are going to go into those questions, but what I was trying to do is not to take up your time and everybody else's time, if we can resolve that. Who do you work for. And what do you?

A. I work for Airtight Electric. I am an electrician.

Q. Your parents, are they alive?

A. Yes.

Q. What does your father do?

A. He retired.

Q. When he was working, what did he do?

A. He was maintenance in Park Ridge.

Q. What about your mother?

A. She's a housewife.

Q. Do you have any brothers or sisters?

A. Five.

Q. Five brothers. Can you tell me, number one, whether they are married, and whether they are employed, and what their wives do, if anything?

A. First one, she's married. It is my sister, and she's a housewife. Her husband is in insurance.

Q. That's good. Okay. You got four more to go.

A. Yeah. The next one, he works for the First National Bank, and he is married, and his wife is a housewife. The next one is –

Q. What does he do for the First National Bank?

A. Oh, gosh.

Q. Does he work in the office?

A. Something to do with taxes.

Q. Okay. Go ahead.

A. And my – my other sister, her husband, at the moment, is unemployed, and she's a housewife. And then it comes down to my brother. He's not married, and he works for Enesco, and he's something to do with product

design, and then there's my sister, and she – she's married, and she works in a medical office.

Q. Okay. Now, you have indicated that you have friends or relatives that are in the police department, is that right?

A. I have a friend in the Morton Grove Police Department.

Q. If a police officer were to testify in this case, would you consider his testimony any greater than anybody else?

A. No.

Q. You don't feel they are more trustworthy than anybody else?

A. No.

Q. You indicated also a lawyer. Can you explain?

A. I have a cousin that's a lawyer in New Mexico.

Q. And that wouldn't affect your rendering a decision in this case, would it?

A. No.

Q. Have you or any members of your family been victims of a crime?

A. I was, about five years ago.

Q. And what happened? What was that all about?

A. I was jumped and beat up.

Q. Did they ever get the party who perpetrated that act?

A. No.

Q. Have you or any members of your family ever been accused of a crime?

A. No.

Q. You were a party to a lawsuit. Could you tell me what's that about?

A. Pardon?

Q. You were a party to a lawsuit?

A. At one time, I cut my hand working for Jewel.

Q. So, you filed a workmen's compensation claim?

A. Yeah.

Q. You didn't have the same problem that the other gentleman had, did you?

A. No.

Q. That wouldn't affect your rendering a decision in this case?

A. No.

Q. Do you have any quarrels with the proposition that the State must prove the defendant guilty beyond a reasonable doubt, and the defendant need not prove anything?

A. No.

Q. Would you sign a guilty verdict if that be the proper verdict?

A. Yes.

Q. If, on the other hand, not guilty were proper, would you hesitate in signing such a verdict?

A. No.

Q. Do you know of any reason why you couldn't be fair and impartial?

A. No.

Q. If selected to act as a juror, would that create any hardship for you?

A. No.

Q. Okay. If the defendant chose not to testify in this case, would you consider his testimony – would you – would you hold this against him?

A. No, I wouldn't.

Q. Now, I've asked you a number of questions. I don't know whether I missed any of them, but if any one of the questions that I missed that I asked the other gentleman, if I were to ask you; would your answers be substantially the same?

A. Yes.

Q. Do you have any hobbies?

A. Just fishing and hunting.

Q. Do you subscribe to any periodicals or publication?

A. Just Outdoor magazine.

Q. Would you automatically vote against the death penalty no matter what the facts of the case were?

A. No.

Q. Do you subscribe to any periodicals or publications, sir?

A. Just Outdoor magazine.

* * * *

Okay. This is the case – excuse me, People of the State of Illinois versus Derrick Morgan.

Ladies and gentlemen, as you know, you've been sent here to act as possible jurors in this case.

Now, we have been in the process of selecting a jury. We need to acquire one more juror with reference to – so that we will have 12 jurors, and then we will also be required to select two alternate jurors. The alternate jurors' question, I'm not going to get involved in that. I'm just going to discuss the – the one needed juror to complete the panel of 12 jurors as required by law.

But before we go into the selection and the questioning of possible jurors, I feel it is appropriate, at this particular time, to advise you of the nature of the case that is pending before the Court.

I would like to introduce you to the various parties and give you a little birds-eye view on what to expect for the next, approximately, week of the case, which is going to take place before this Court.

For purpose of your information, ladies and gentlemen, the defendant is charged with on or about December 17 of 1985, with committing the offense of murder, in that he, without lawful justification, intentionally and

knowingly shot and killed David Smith with a handgun in violation of the State statute.

He is also charged with on the same date, time, and place, committing the offense of murder in that he, without lawful justification, shot and killed David Smith with a handgun, knowing that such shooting with a handgun created a strong probability of death or great bodily harm to said David Smith in violation of the State statute.

That this event is said to have occurred on the date indicated herein, at, approximately, 9:00 p.m., and the location of said incident is at 4527 South Calumet Avenue, Chicago, Cook County, Illinois.

Now, the State has indicated that it is their intentions to treat this as a capital case, which means that the case before the Court will involve two phases.

The first phase will be to determine whether or not the defendant is guilty of the charges before the Court, and the second phase will be the jury may be required to make a determination of whether or not the defendant qualifies for a possible death sentence, and then if that determination is made, then it goes into subsequent proceedings to decide whether or not the death sentence should be invoked.

* * *

Now, do you have any moral or religious conviction against the imposition of the death penalty so strong that you would be unable, without violating your own principle, to vote to recommend a death penalty regardless of the facts of the case?

A. I have.

Q. Okay. Yes, ma'am?

A. I don't think I could give –

Q. Ma'am, one at a time, please, okay? Yes, ma'am. Would you – what would your statement be, please?

A. I said that I don't believe that I can give a death penalty.

Q. What do you reach that conclusion on?

A. Just knowing myself. I don't think I could do it.

A. I don't think I could do it either, sir.

Q. Ma'am, you'll have plenty of opportunity to explain your position, okay? I'm still speaking with the young lady next to you.

You say you don't believe that you could do it. Why do you say that? For what reason do you make that particular statement?

A. Well, simply because I know myself and I – I – I – if someone struck me, I would not strike them back.

Q. Would you automatically vote against the death penalty regardless of what the facts are?

A. I believe I would.

Q. Just because the death sentence could be invoked?

A. That's correct.

Q. And that's only – you have no basis for it? Was it moral or religious or a personal opinion, or how would you classify that particular statement?

A. I would classify it as a moral statement.

Q. Okay. Ma'am, you're excused. Thank you. You, ma'am, what is your problem with reference to that?

A. Well, I couldn't do it either. I just couldn't vote for the death penalty. Mostly, I guess because I work with the – you know – and I just know how they are, you know.

Q. I really don't – I don't understand. You say you know how they are. What do you mean by that?

A. I know how the young folks are, you know?

Q. No, I don't.

A. Well, it is not quite like it is in here, you know? It is different.

Q. That I can understand, because there are just a limited amount of people in here and so forth. But the fact that young people are noisy, does that make it any different?

A. No. They are kind of – kind of – kind of a little wild, too, punching, you know, and all of that.

Q. You know, folks, I questioned quite a number of people, and this is no reflection on you, but I get so tempted sometimes to exress my own personal opinion, which I have a right to, but which I cannot, because I don't think it is appropriate under the circumstances.

But based upon your feeling that you – in other words, you would find the defendant not guilty?

A. No, I couldn't vote for the death penalty, sir.

Q. You would find the defendant not guilty even though you felt he was guilty because of the fact that a death sentence could be imposed upon him?

A. Yes.

Q. I'll excuse both of you, ladies. Thank you.

MR. RHODES: Your Honor, may I be heard?

THE COURT: Yes, you may.

(The following proceedings were had out of the hearing and presence of the prospective jurors:)

THE COURT: This is going to end sometime. Go ahead.

MR. RHODES: Judge, the way you asked the first lady about the guilt/innocent phase with respect to that –

THE COURT: No, I don't, and I don't believe I have to ask each one the same question.

The purpose of the question is for me to determine as a judge, sitting as a trier of facts, whether I feel that a particular individual, who is sent up here to act as a juror, can be – can consider the death sentence as a possible means of achieving the case before the Court, and when they indicate that they have objections to it, and they couldn't do it, I don't think I have to delve into any personal aspects of it, if I am satisfied. I know you make your record, as it is right now, but I feel that I have gone far enough, and I'm going to excuse both of them for cause. Okay.

MR. RHODES: Judge, as to the first lady, she never said I could not give it.

THE COURT: Mr. Rhodes, –

MR. RHODES: I don't think.

THE COURT: Mr. Rhodes, I don't think I have to go over what she said. I know what she said in my own mind, and I am satisfied that she cannot properly sit on this tribunal or sit on this panel of jurors because of her responses, and that will stand there. Thank you.

MR. RHODES: Thank you, Judge.

(The following proceedings were had in the hearing and the presence of the prospective jurors:)

THE COURT:

Q. Your last name?

A. Patricia Robinson.

Q. Your name, please?

A. Delores Newton.

THE COURT: You are excused, ma'am. You'll return back to the jury room. Thank you.

* * *

STUART SHIP,
called as a prospective juror, having been first sworn, answered questions as follows:

EXAMINATION BY THE COURT:

THE COURT:

Q. Would you state your name, spelling your last name for me?

A. First name is Stuart, last name Ship, S-h-i-p.

Q. Mr. Ship, are you skill [sic] residing at the same address?

A. Yes.

Q. How long have you so resided?

A. A little bit over a year.

Q. You've never served on a jury before, is that right?

A. No, I haven't.

Q. You are single, is that correct?

A. Yes, sir.

Q. Who do you work for, and what do you do?

A. I work for Consolidated Distilled Products as a salesman. I sell wine and distilled products.

Q. Are your parents alive?

A. Mother is alive.

Q. Is she employed?

A. No, she isn't.

Q. Do you know if she ever worked?

A. She worked for my father many years ago. My father was in grocery products.

Q. Are your parents alive?

A. Mother is alive.

Q. Is she employed?

A. No, she isn't.

Q. Do you know if she ever worked?

A. She worked for my father many years ago. My father was in the grocery store business.

Q. Okay. Do you have any brothers or sisters?

A. Two older brothers.

Q. Are they married?

A. One is married, and one is divorced.

Q. The one that's married, what does he do for a living?

A. He is an accountant.

Q. What does his wife do?

A. She's a secretary.

Q. Now, the one that is divorced, what does he do for a living?

A. He's an investment banker.

Q. His former wife, what did she do, if you know?

A. She was an assistant manager at a clothing botique [sic].

Q. Now, do you have any friends or relatives in the police department, State's Attorney's Office, or any other law enforcement agency?

A. No, your Honor.

Q. If a police officer were to testify in this case, would you consider his testimony any greater than anybody else?

A. No, sir.

Q. You wouldn't feel he's more trustworthy than anybody else, would you?

A. No, sir.

Q. Have you or any other members of your family been victims of a crime?

A. I have.

Q. Can you tell me about that, sir?

A. My apartment was broken into.

Q. Did they ever get the party who perpetrated the act?

A. No.

Q. Would that affect your rendering a decision in this case?

A. No, I don't believe so.

Q. Have you or any members of your family ever been accused of a crime?

A. No, your Honor.

Q. Do you know of any reasons why you cannot give this defendant a fair trial?

A. No.

Q. Would you automatically vote against the death penalty no matter what the facts of the case were?

A. I would not vote against it.

Q. If the defendant chose not to testify, would you hold that against him?

A. It is hard to say if I believe him or not.

Q. Well, why do you say it is hard to say?

A. Well, I'm trying to be fair right now and say that without his testimony, I could be fair, but sometimes going through the trial; I might be thinking why isn't he coming to the bench? So, I'm trying to be honest.

Q. Well, you understand, sir, that under the law, the State has the burden - in other words, the chore of proving the defendant guilty beyond a reasonable doubt?

A. Hmm, hmm, right.

Q. The defendant need not do anything.

A. Hmm, hmm.

Q. Under the law, he is presumed to be innocent of those charges, and if he chooses not to testify, that's his right.

A. Right.

Q. That doesn't shift anything. It still makes the State prove his guilt beyond a reasonable doubt. The fact he testifies should have absolutely no bearing on his guilt. Do you understand that?

A. Yes.

Q. Can you accept that proposition?

A. I can accept it, yes.

Q. Okay, fine. If you were convinced beyond a reasonable doubt to sign a guilty verdict, would you sign such a verdict?

A. Yes.

Q. If, on the other hand, not guilty were proper, would you sign such a verdict?

A. Yes.

Q. You don't have any quarrels with the proposition that the State must prove the defendant guilty beyond a reasonable doubt, and the defendant need not prove anything, do you?

A. I stand by that, yes.

Q. Okay. And if selected as a juror, would that create any hardship for you?

A. In terms of being off of work for a week, it might, a long period.

Q. Well -

A. That's the only hardship really.

Q. I understand, but that's true of anybody that's employed.

A. Yes.

Q. I know it is kind of a rough situation, but that would be true with anybody.

A. Hmm, hmm.

Q. But the fact it does create that situation, would that constitute a possibility that you couldn't be fair and impartial?

A. I don't think so.

Q. And do you have any hobbies, sir?

A. I like to read.

Q. Do you subscribe to any periodicals or publications?

A. Newsweek, Car and Driver.

Q. You feel you could give both sides a fair trial?

A. Yes.

THE COURT: Thank you. Gentlemen?

MR. GAMBONEY: Your Honor, we'll accept and tender this juror.

THE COURT: Defense?

MR. HICKS: We would ask for a hearing at sidebar.

THE COURT: Yes, sir.

(The following proceedings were had out of the hearing and presence of the prospective jurors:)

MR. HICKS: Your Honor, when you asked Mr. Ship about the defendant's right to remain silent, he at first hesitated, and then forthrightedly told you that right now, he is a [sic] trying to be fair.

However, once the trial is going, he may have a problem with his not testifying. You did ask follow-up questions trying to get to his feelings on that point. We feel, as this is a capital case and it is very important, that this person should be disqualified for cause since he has

stated that – that hesitancy, and we don't believe that your follow-up questions have been sufficient to overbear any kind of reservations he may have. If we get into the trial, it will be too late.

THE COURT: Mr. Hicks, no matter what I would have said or done, as far as you are concerned, would have satisfied you. I don't believe there is any basis for excusing him for cause. I don't care what kind of a case this is.

I try – I try the case regardless of what the nature of the charges are. My duty, as a judge, is not to base my decisions on the fact that a case is a capital case, or if it is just an ordinary shoplifting case.

Each case is the same, and it has the same kind of consideration and the same kind of ultimate results, and I believe that I have followed the necessary requirements. I have not slanted anything on favoring one side over another. I'll note your objections and overrule it. Make your determination whether or not you want to proceed.

MR. HICKS: Well –

MR. RHODES: Judge, we'd be asking for an additional challenge.

THE COURT: Your request was made before, and I denied it, and I still deny it. Thank you.

MR. HICKS: Inasmuch as we have no more challenges, we have no choice but to accept him.

THE COURT: Would you do that formally so the people know?

MR. HICKS: Sure, okay.

THE COURT: I don't want them to -

MR. HICKS: Okay.

THE COURT: I didn't put myself in that position. Thank you, gentlemen.

(The following proceedings were had in the hearing and the presence of the prospective jurors:)

THE COURT: Defense.

MR. HICKS: Your Honor, we would accept Mr. Ship.

THE COURT: Mr. Ship, accordingly, you've been accepted to act as a juror in this case. Would you, please, stand up and raise your right hand to be sworn by the clerk of the Court?

THE CLERK: You and each of you (sic) do solemnly swear by the ever-living God that you will well and true try the issues joined herein and true deliverance make between the People of the State of Illinois and the defendant at the bar and a true verdict render according to the law and the evidence?

THE COURT: You do?

THE JUROR: I do.

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RONALD ZUBKOFF,

called as a prospective juror, having been first sworn, answered questions as follows:

EXAMINATION BY THE COURT:

Q. Sir, would you state your name, spelling your last name for me?

A. Ronald Zubkoff, Z-u-b-k-o-f-f.

Q. Mr. Zubkoff, are you still residing at the same address indicated her?

A. Yes, sir.

Q. How long have you so resided?

A. Nine years.

Q. You've never served on a jury before?

A. No, sir, I have not.

Q. You understand what is required of an alternate juror. Does that create any problem for you?

A. No, sir.

Q. The nature of the charges, does that create any problem?

A. No, sir.

Q. Would you automatically vote against the death penalty no matter what the facts of the case were?

A. No, sir.

Q. You are presently employed by whom, and what do you do for them?

A. I am self-employed. I am a certified public accountant.

Q. I – I – I – before I – before I read the – looked at the card, I just asked the question. Normally, I can see that. You are presently divorced, is that right?

A. Yes, sir.

Q. What did your wife do – your former wife do?

A. Now?

Q. Did she work?

A. When we were married, she worked part time at small jobs.

Q. You have three children. The oldest is 21. Is that a boy or a girl?

A. A boy.

Q. Is he employed?

A. He's a student.

Q. Where is he going to school?

A. Boston University.

Q. He's not married, is he?

A. No, sir.

Q. The 18-year old, boy or girl?

A. A boy.

Q. He's going to school as well?

A. He'll be a freshman starting college.

Q. The 15-year old?

A. Will be a junior at high school, boy also.

Q. Okay, fine.

Do you have any friends or relatives in the police department, State's Attorney's Office, or any other law enforcement agency?

A. Yes, I do.

Q. If a police officer were to testify in this case, would you consider his testimony any greater than anybody else?

A. No, sir.

Q. You – you have also indicated that you knew a lawyer. Can you explain that, sir?

A. Well, I have been divorced a couple of times, and I've become friendly with them and also I, I know – I'm fairly good friends with some tax attorneys.

Q. Okay. Anybody else that you would like to talk about? Anybody else in – in – in the nature of a police officer or individuals of that nature?

A. I have some friends that I know through army reserve that are either policemen or with the State police.

Q. Again, that wouldn't in any way affect you rendering a decision in this case, would it?

A. No, sir.

Q. The nature of the charges, does that create any problems for you?

A. No, it does not.

Q. Have you or any members of your family ever been victims of crime?

A. Yes. My home was broken into.

Q. Did they ever get the party who perpetrated that act?

A. No, sir.

Q. Have you or any members of your family ever been accused of crime?

A. No.

Q. You indicate you were a party to a lawsuit, and you were also in divorce cases. Is that what you were referring to?

A. Well, yes. I wasn't sure of the divorce case, but once I had to sue a client for fees.

Q. I see.

A. Big mistake, and I did it.

Q. What was that, a civil matter?

A. Yes.

Q. Were those matters ultimately resolved?

A. Yes.

Q. I don't think that's very rare in cases of a CPA. It is rare when you don't have to get involved in that aspect of it, dealing with people as it is.

Now, if the defendant chose not to testify, would you hold that against him?

A. No, sir.

Q. You don't have any quarrels with the proposition that the State must prove the defendant guilty beyond a reasonable doubt and the Defense need not prove anything, do you?

A. No, sir.

Q. Would you follow my instructions on the law to be applied in this case even though you may not agree to them?

A. Yes, sir.

Q. Your being selected as a juror, would that create any hardship for you?

A. To be honest –

Q. Except the fact you lose money?

A. That's not the point. To be honest, I have some time constraints this month as I'm going on my annual training duty the 31st.

Q. Of this month?

A. The 31st of July, I'm going away for two weeks for my annual active duty for training.

Q. Sir, I can guarantee you that on the 31st of July, you will not be sitting in here in the trial of the case?

A. No.

Q. Because on the 22nd, I'm going on a vacation.

A. Okay.

Q. If these people have to work all night long and into the morning hours, they are going to do it to get this case over with. It is not going to last more than a week, okay?

A. My problem is I'm a sole practicioner [sic] and one part time helper.

Q. We don't work late hours here. I usually get through early. As a matter of fact, we are going to adjourn fairly early today.

I would like to get you home at a reasonable period of time. Can you take care of any of those matters in the evening?

A. I will do my best, yes.

Q. I would appreciate it, if you are selected. If you would ~~make the~~ necessary adjustments because be that as it may, we try to move with dispatch.

I know your time is valuable, and I certainly will not keep you here any longer than is absolute [sic] necessary, and it is not beneficial to the attorneys involved, but all of the parties that are required to participate would like to get home at a reasonable hour, and I don't feel that it is right and justifiable to keep you here late, okay?

A. Yes, sir.

Q. You'll get home at a reasonable period of time and, perhaps, you might be able to contact or have someone contact these people in the evening and so forth to take care of business, is that right?

A. Yes, sir.

Q. Does that sound pretty good?

A. Yes, sir.

Q. It is acceptable, okay?

A. Yes, sir.

Q. Would you sign a guilty verdict if that be a proper verdict?

A. Yes.

Q. If, on the other hand, not guilty were proper, would you sign such a verdict?

A. When you say proper –

Q. That means the facts –

A. I didn't want to interrupt everybody else. You asked that, too, but I waited for my turn.

Q. Whether it is proper?

A. Yeah.

Q. When I say it is proper, the State has to prove the facts beyond a reasonable doubt, and then after you have heard the evidence, and you retire to the jury room to deliberate on your verdict, you all must unanimously agree that the State has met its burden, namely proof beyond a reasonable doubt and, of course, a proper verdict would be guilty.

A. Yes, sir.

Q. But if, on the other hand, they failed to meet this requirement, then the only thing you can do is a not guilty verdict and under the law, when a verdict is

reached by the jury, all persons in the jury, including the foreman, must sign the verdict form.

So, all I'm asking you is whether or not you would hesitate to do this, if, based upon the hypothetical situation or the situation – not hypothetical, but the factual situation that I just disclosed exists, okay?

A. No. Thank you for the explanation.

Q. I hope I didn't confuse you too much.

A. No, you answered it fine, thank you.

Q. Okay? Do you feel you could give both sides a fair trial?

A. Yes, I do.

Q. Do you have any hobbies, sir?

A. Not a lot of time for them. I do like to read.

Q. The trouble is you should have time for hobbies. Time is running out on all of us.

A. That's true.

Q. And priorities sometimes get you out of reality and then you find out – well, whatever. I'm not being a philosopher. I'm just being realistic about it.

A. Yes.

Q. Do you subscribe to any periodicals or publications?

A. Yes, other than professional and Newsweek.

THE COURT: Gentlemen?

MR. GAMBONEY: Your Honor, we'll accept and tender Mr. Zubkoff.

THE COURT: Defense?

MR. HICKS: Your Honor, we will accept Mr. Zubkoff.

THE COURT: Sir, you've been accepted as an alternate juror. If you would, please, remain for the questioning; we'll continue with the questioning, and then after the second alternate is accepted, then we'll both – both will be sworn in, okay?

A. Yes, sir.

* * *

THE COURT: Ladies and gentlemen, in this court room that almost completes the proceeding with reference to the stage pending before the Court in the eligibility stage. Before I ask you to retire and deliberate to a verdict in this particular matter, I will instruct you on the law as I did in the original case, reciting various propositions of law you must use and you have indicated when you were first chosen as jurors to follow my instructions, disregarding any preconceived notions you may have had with reference to the applicable law in this case. I don't think there is any further need to go over these various matters except for submitting the instructions as prepared and which will be submitted to you in writing to reach a verdict in this case.

Accordingly, these instructions recite the following language:

(Whereupon the Court instructed the jury as follows:)

Members of the jury, evidence and argument have been completed, and I now will instruct you as to the law.

The defendant in this case has been convicted of the crime of murder. The State has requested that the defendant be sentenced to death.

A death penalty hearing is divided into two parts. During the first part the jury decides whether the defendant is eligible for a death sentence under the law. If the jury unanimously decides that the defendant is eligible for a death sentence, then during the second part of the hearing the jury decides whether the defendant shall be sentenced to death.

This is the part of the death penalty hearing. During this part of the hearing you will decide only whether the defendant is eligible for a death sentence under the law, then there will be no second part of the death penalty hearing. The court will impose a sentence other than death.

If you unanimously decide that the defendant is eligible for a death sentence, then we will go to the second part of the hearing. During the second part both the State and the defendant may offer more evidence on why the defendant should be sentenced to death or should not be sentenced to death.

I. P. I. Criminal Number 7B.01

People's Instruction Number 1

The law that applies to this hearing is stated in these instructions and it is your duty to follow all of them. You must not single out certain instructions and disregard others.

You are not to be swayed by more sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling. You should not be influenced by any person's race, color, religion or national ancestry.

Neither by these instructions nor by any ruling or remark which I have made do I mean to indicate any opinion as to the facts or as to what your verdict should be.

Faithful performance by you of your duties is vital to the administration of justice.

I. P. I. Criminal Number 7B.01A

People's Instruction Number 2.

You are the sole judges of the believability of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, his age, his memory, his manner while testifying, any interest, bias or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case.

I. P. I. Criminal Number 1.02

Opening statements are made by the attorneys to acquaint you with the facts they expect to prove. Closing arguments are made by the attorneys to discuss the facts and circumstances in the case, and should be confined to

the evidence and to reasonable inferences to be drawn from the evidence. Neither opening statements nor closing arguments are evidence, and any statement or argument made by the attorneys which is not based on the evidence should be disregarded.

I. P. I. Criminal No. 1.03

People's Instruction Number 4

It is your duty to determine the facts and to determine them only from the evidence. You are to apply the law to the facts and in this way decide whether the defendant is eligible for a death sentence.

The evidence which you should consider consists of the testimony and exhibits which the court has received during the trial of this case and during this first part of the death penalty hearing. This means you should consider both the evidence received at trial and the evidence received at this hearing.

From time to time it has been the duty of the court to rule on the admissibility of evidence. You should not concern yourselves with the reasons for these rulings. You should disregard questions and exhibits which were withdrawn or to which objections were sustained.

Any evidence which was received for a limited purpose should not be considered by you for any other purpose.

You should disregard testimony and exhibits which the court has refused or stricken.

I. P. I. Criminal Number 7B.03

People's Instruction Number 5

The defendant is presumed not to be eligible for a death sentence under the law. This presumption remains with him throughout every state of the first part of the death penalty hearing and during your deliberations on the verdict, and is not overcome unless from all the evidence you are convinced beyond a reasonable doubt that the defendant is eligible for a death sentence.

The State has the burden of proving beyond a reasonable doubt that the defendant is eligible for a death sentence under the law, and this burden remains on the State throughout the first part of the death penalty hearing. The defendant is not required to prove that he is ineligible for a death sentence.

I.P. I. Criminal Number 7B.04

People's Instruction Number 6

The fact that the defendant did not testify should not be considered by you in any way in arriving at your verdict.

I.P.I. Criminal Number 2.04

Defense Instruction Number 1

A defendant is eligible for a death sentence under the law if he was 18 years old or older at the time he committed the murder of which he was found guilty at the trial of this case; and a statutory aggravating factor exists.

I.P.I. Criminal Number 7B.06

People's Instruction Number 8

A defendant is eligible for the death sentence under the law if he was eighteen years of age or older at the time he committed the murder of which he was found guilty at the trial of this case and, second, the statutory aggravating factor exists.

I.P.I. Criminal Number 7B.06

People's Instruction Number 8

Before a defendant may be found eligible for a death sentence under the law the State must prove the following propositions:

First: That the defendant was 18 years old or older at the time of the commission of the offense of the murder of which he was found guilty at the trial of this case; and

Second: That the following statutory aggravating factor exists: The defendant committed the murder pursuant to a contract, agreement or understanding by which he was to receive money or anything of value in return for committing the murder.

If you find from your consideration of all the evidence that the first and second propositions have been proved beyond a reasonable doubt, then the defendant is eligible for a death sentence.

If you cannot unanimously find that both the first and second propositions have been proved beyond a reasonable doubt, the defendant is not eligible for a death sentence.

I.P.I. Criminal Number 7B.07

Peoples Instruction Number 9

When you retire to the jury room your foreperson will preside during your deliberations on your verdict. Your verdict must be in writing and signed by all of you, including your foreperson. Any verdict finding the defendant eligible for a death sentence must be unanimous.

You will receive two forms of verdict.

I.P.I. Criminal Number 7B.07

People's Instruction No. 9

The first verdict form to be submitted to you reads as follows:

We, the jury, unanimously find beyond a reasonable doubt that the defendant, Derrick Morgan, is eligible for a death sentence under the law. We unanimously find beyond a reasonable doubt that the defendant was eighteen years old or older at the time of the murder for which he was convicted in this case and we unanimously find beyond a reasonable doubt that the statutory aggravating factor exists.

I.P.I. Criminal Number 7B.10

People's Instruction Number 11

The other form will be,

We, the jury, cannot unanimously find beyond a reasonable doubt that the defendant, Derrick Morgan, is eligible for a death sentence under the law.

We, the jury, cannot unanimously find beyond a reasonable doubt that the defendant was eighteen years of age or older at the time of the murder for which he was convicted in this case or we cannot find unanimously

beyond a reasonable doubt that a statutory aggravating factor exists.

I.P.I. Criminal Number 7B.12

People's Instruction Number 12.

Ladies and gentlemen, that concludes the jury instructions with reference to the matter pending before the Court. Accordingly, you will be excused to retire to the jury room and deliberate on your verdict. Before you do, I will swear in all the deputy sheriffs.

* * *

THE COURT: Ladies and gentlemen, as you can readily understand, we have reached a point in the trial in this case, and I think I have said this on a couple of other occasions, this will be the last time that I will address you pertaining to that particular aspect, except to state that these instructions are similar in nature.

The instructions were not the same but similar in nature, in that there are propositions of law that you are to use in reaching a verdict with reference to the matters pending before this Court. I can go over and make some other broad statements, but I think that you pretty much have heard enough, if not too much.

Accordingly, to limit the exposure from this particular bench, I will read those instructions and I will present them to you through the sheriff for you to use in your deliberations on your verdict:

Members of the Jury, the evidence and arguments have been completed, and I will now instruct you as to the law.

This is the second part of the death penalty hearing. At this hearing you will determine whether the Defendant will be sentenced to death.

The law that applies to this case is stated in these instructions, and it is your duty to follow all of them. You must not single out certain instructions and disregard others. When I use the word "he" in this instruction, I mean male or female.

You are not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.

You must not be influenced by prejudice towards any person involved in this case. You must not be influenced by any person's race, color, religion or national ancestry.

Neither by these instructions nor by any ruling or remark which I have made do I mean to indicate any opinion as to the facts or as to what your verdict should be.

Faithful performance by you of your duties as jurors is vital to the administration of justice.

I.P.I. Criminal Number 7 C 01

People's Instruction No. 1

It is your duty to determine the facts and to determine them only from the evidence in this case. You are to apply the law to the facts and in this way decide whether the Defendant will be sentenced to death.

The evidence which you should consider consists of the testimony and exhibits which the Court has received

during the trial of this case, during the first part of the death penalty hearing and during this second part of the death penalty hearing. This means you should consider all the evidence, whether received at the trial, during the first part of the death penalty hearing or during this second part of the death penalty hearing.

From time to time it has been the duty of the Court to rule on the admissibility of evidence. You should not concern yourselves with the reasons for these rulings. You should disregard questions and exhibits which were withdrawn or to which objections were sustained.

Any evidence which was received for a limited purpose should not be considered by you for any other purpose.

You should disregard testimony and exhibits which the Court has refused or stricken.

I.P.I. Criminal Number 7 C.02

People's Instruction Number 2

You are the sole judges of the believability of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, his age, his memory, his manner while testifying, any interest, bias or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case.

I.P.I. Criminal Number 1.02

People's Instruction Number 3

Opening statements are made by the attorneys to acquaint you with the facts they expect to prove. Closing arguments are made by the attorneys to discuss the facts and circumstances in the case, and should be confined to the evidence and to reasonable inferences to be drawn from the evidence. Neither opening statements nor closing arguments are evidence, and any statement or argument made by the attorneys which is not based on the evidence should be disregarded.

I.P.I. Criminal Number 1.03

People's Instruction Number 4

The fact that the Defendant did not testify should not be considered by you in any way in arriving at your verdict.

I.P.I. Criminal Number 2.04

People's Instruction Number 5

Aggravating factors may be found in any evidence presented during the trial, during the first part of the death penalty hearing, or during the second part of the death penalty hearing.

During the first part of the death penalty hearing you found that the State had proved that a statutory aggravating factor exists.

During the second part of the death penalty hearing, k [sic] the State may prove that other aggravating factors exist, but the State is required to – is not required to do so.

Mitigating factors may be found in any evidence presented during the trial, during the first part of the

death penalty hearing, or during the second part of the death penalty hearing.

During the second part of the death penalty hearing, the Defendant may prove that mitigating factors exist, but the Defendant is not required to do so.

I.P.I. Criminal Number 7 C 04

People's Instruction Number 6

Under the law the Defendant shall be sentenced to death if you unanimously find that there are not mitigating factors sufficient to preclude imposition of a death sentence.

If you are unable to unanimously find that there are no mitigating factors sufficient to preclude imposition of a death sentence, the Court will impose a sentence other than death.

I.P.I. Criminal Number 7 C 05

People's Instruction Number 7

In deciding whether the Defendant should be sentenced to death, you should consider all the aggravating factors supported by the evidence and all the mitigating factors supported by the evidence.

Aggravating factors are reasons why the Defendant should be sentenced to death. Mitigating factors are reasons why the Defendant should not be sentenced to death.

Aggravating factors include:

First: The Defendant committed the murder pursuant to a contract, agreement or

understanding by which he was to receive money or anything of value in return for committing the murder.

Second: Any other reason supported by the evidence why the Defendant should be sentenced to death.

Mitigating factors include:

Any reason supported by the evidence why the Defendant should not be sentenced to death.

If you unanimously find, from your consideration of all the evidence, that there are no mitigating factors sufficient to preclude imposition of a death sentence, then you should sign the verdict requiring the Court sentence the Defendant to death.

If you do not unanimously find, from your consideration of all the evidence, that there are no mitigating factors sufficient to preclude imposition of a death sentence, then you should sign the verdict requiring the Court to impose a sentence other than death.

I.P.I. Criminal Number 7 C 06

People's Instruction Number 8

When you retire to the Jury room, your foreperson will preside during your deliberations on your verdict. You [sic] verdict should be in writing, and signed by all of you, including your foreperson.

You may not sign a verdict imposing a death sentence unless you unanimously vote for it.

You will receive two verdict forms. These verdict forms read as follows:

I.P.I. Criminal Number 7 C 07

People's Instruction Number 9

We, the Jury, unanimously find that there are no mitigating factors sufficient to preclude imposition of a death sentence.

The Court shall sentence the Defendant, Derrick Morgan, to death; and

I.P.I. Criminal Number 7 C 08

People's Instruction Number 10

We, the Jury do not unanimously find that there are no mitigating factors sufficient to preclude a death sentence.

The Court shall not sentence the Defendant, Derrick Morgan, to death.

I.P.I. Criminal Number 7 C 09

People's Instruction Number 11

THE COURT: Accordingly, ladies and gentlemen, that concludes all the instructions for the Court to present to you. As I stated to you, they will be presented to you in writing.

You will be asked to retire to the Jury room to deliberate on your verdict, but first the Clerk is instructed to swear the Deputy Sheriffs in.

* * *

SUPREME COURT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. DERRICK MORGAN, Appellant.

Docket No. 67692 – Agenda 4 – November 1990.

JUSTICE MORAN delivered the opinion of the court:

The defendant, Derrick Morgan, was indicted along with Milbon Lockridge (a.k.a. Poncho) and Sam Green (a.k.a. B-Bop) by a Cook County grand jury on two counts of murder and one count of armed violence for the shooting death of David "Swift" Smith (Smith). The armed violence charge against the defendant was later dismissed. After a jury trial, defendant was found guilty of murder. The jury subsequently found him eligible for the death penalty and sentenced him to death. Defendant appeals directly to this court (107 Ill. 2d R. 603).

Concerning pretrial proceedings, the defendant raises as issues whether: (1) a *Batson* violation occurred; and (2) the trial court erred by excusing potential jurors who expressed reservations about the death penalty and by refusing defendant's request to further question a juror about whether his attackers in a beating had been African-American.

Pertaining to the guilt phase of his trial, the defendant raises as issues whether: (1) he was proven guilty beyond a reasonable doubt; (2) the trial court erred by granting the State's motion *in limine* so that he could not present evidence that another person had committed the crime; (3) the trial court erred by allowing two defense witnesses to refuse to testify on the grounds of the fifth amendment; (4) the trial court properly informed two

defense witnesses of the consequences of testifying on his behalf; (5) the trial court erred in advising some witnesses of the consequences of perjury, and in not advising others; (6) actions and comments by the trial judge denied him a fair trial; (7) he was denied his sixth amendment right to confront and cross-examine witnesses when the State elicited hearsay testimony that Smith told his girlfriend that if anything happened to him, he would be with the defendant; (8) his rights of confrontation were violated when a police office testified that he spoke with Milbon Lockridge, a convicted accomplice who did not testify about the murder, which led to the officer's investigation of him; (9) he was denied the opportunity to present a defense when his alibi witness was stricken because she was allegedly not disclosed as an "alibi witness"; (10) the trial court erred when it struck all of his alibi witness' testimony and, if it did, whether it erred in striking all of it when some of it did not pertain to the alibi; (11) reversible error was committed in the State's closing argument; (12) the trial court erred in refusing to allow him to call a police officer as a witness for the purpose of impeaching the officer with his own police report; (13) the trial court erred in refusing to grant a hearing on his oral motion to suppress an in-court identification; and (14) the trial court further made errors in admitting certain evidence and not admitting other evidence, and by sustaining objections to his closing argument.

The defendant also raises as issues pertaining to his sentencing hearing whether: (1) he was eligible for the death penalty; (2) his eighth amendment right to a fair sentencing hearing was denied when Smith's girlfriend

was allowed to state that she was pregnant when he was killed, and when a photo of Smith and his child were admitted into evidence; (3) the State misstated the law and the evidence at the first stage of sentencing, thus denying defendant a fair sentencing hearing; (4) he was denied a fair sentencing hearing at the second stage when he was not allowed to show that a third party had recently threatened Smith, and that the third party had the opportunity to convince key witnesses to falsely implicate the defendant; (5) the trial judge denied him a fair sentencing when he made several statements during *voir dire* that the jurors were not responsible for imposing the death penalty; (6) he had a right of allocation; (7) he was denied a fair sentencing when the State was not limited to one closing argument at sentencing; (8) he was denied an impartial jury when the judge refused to ask jurors whether, if they found him guilty, they would automatically impose the death penalty; (9) he was denied a fair sentencing when the jury was told to disregard sympathy; and (10) he was denied a fair sentencing when evidence of charged, but unconvicted, crimes was admitted.

The defendant also raises issues as to the constitutionality of the death penalty statute, as well as to whether the trial court erred in denying his *pro se*, post-trial motion alleging ineffective assistance of counsel.

On December 17, 1985, at about 9:15 p.m., police officers responded to a radio dispatch regarding a shooting. Chicago police officer Thomas Kampenga testified as follows: that he and his partner, Officer Robert Skahill, found the victim, David Smith, lying in a pool of blood; that he noticed several gunshot wounds to Smith's head;

and that he saw a clear plastic bag containing a white powder lying next to the body. Both Officers Kampenga and Skahill testified that they had earlier seen the defendant and Smith exit the building where Smith lived, enter a grocery store across the street, and leave the store a short time later. Officer Skahill said that, as he was interviewing people around the building where Smith lived, he only noticed Smith leave the building, with the defendant following him. Officer Kampenga further stated that since he knew where Smith lived, he and his partner went to his apartment and informed his live-in girlfriend that he had been killed; she told them that Smith may have been with the defendant; and their subsequent search for the defendant was not successful.

Lashone Joyner testified as follows: that she was Smith's girlfriend and they lived together; that on December 17, 1985, at 4 p.m., she was home alone cooking when two men whom she knew only a "B-Bop" and "Poncho" visited; that she had known the men since 1975 from visiting their disco at the El Rukn Temple; that the men asked if Smith was home, and she told them he was not; that later that evening Smith came home, and then went out again; that at about 8 or 8:30 Smith came home alone, but then let the defendant (whom she knew only as "Tate") in; that she had known defendant for seven or eight years, and that he and Smith were friends; that she overheard defendant tell Smith that he had something for them to do; and that, as he left the apartment, Smith told her that "if anything happen [*sic*] to him, he would be with [defendant]."

Dr. Eupil Choi, an assistant Cook County medical examiner, testified that Smith was killed from multiple

gunshot wounds to the head, and that he found six bullets in Smith's head.

Peter Poole, a forensic chemist then employed by the Chicago police department, testified as follows: that he performed a series of tests on the bag of white powder found next to Smith's body; that based on those tests, he determined that the powder did not contain any controlled substance or common adulterants; and that the substance appeared to have the color and consistency of flour.

Chicago police detective John Robertson testified as follows: that four months after Smith's murder, he was working on an unrelated case and he had become quite familiar with the El Rukn street gang; that as part of that investigation he spoke with Milbon Lockridge (nicknamed "Poncho"); that Lockridge told an assistant State's Attorney (as well as a grand jury), in his presence, about defendant's involvement in Smith's murder; that he then secured a warrant for defendant's arrest; that he later learned that defendant was in custody in LaPorte County, Indiana; and that he visited defendant in the LaPorte County jail, where he was being held under the alias "Larry Tate" and informed him of the arrest warrant. Officer Robertson also stated that he later learned that the defendant had confessed to an inmate, Stephen William Benjamin (Benjamin), at the LaPorte County jail. Robertson further testified that he went to the prison with a photo array, and Benjamin identified the defendant as the person who confessed to the murder.

Benjamin testified that he was in the LaPorte County jail in May 1986, serving a 115-day sentence for driving

while intoxicated. He said that on a Saturday evening in mid-May, he had a conversation with the defendant, whom he then knew as "Larry Tate." According to Benjamin, the defendant told him: that there was a "hold" on him from Chicago for a murder that he and two other El Rukn gang members, B-Bop and Poncho, had committed; that he had been paid by "a big dop dealer" $2,000 before and $2,000 after he murdered a man that defendant called "Swift"; that on the night of the murder, he had placed a bag of flour in an abandoned apartment, and then went to Swift's house to pick him up; that he wanted Swift to believe that the bag contained cocaine; that when he picked Swift up, he told him that he had some cocaine for them to pick up; that he and Swift then walked to the abandoned apartment; that in the meantime, B-Bop was at the apartment to make sure that "the hit went down," and either B-Bop or Poncho was in the the [sic] getaway car; and that as Swift finished tasting the flour, defendant pulled out a .357 and shot Swift five or six times in the head.

Benjamin also testified that the defendant told him that he was going to attempt to escape from the LaPorte County jail during a trip to the dentist office by killing the guards. He said that defendant told him that B-Bop would meet him and that they would go back to Chicago to "take care of all of the witnesses." Shortly after Benjamin had this conversation, he told a jail guard the substance of his conversation with the defendant, and was transferred to another cell block in the prison. He further testified that he was not promised anything in exchange for his testimony, as he was scheduled to get out of the LaPorte County jail in June 1986 anyway.

Constance Smith, the victim's sister, testified to the following: that she was at the victim's apartment at 7:50 p.m. on the night that he was murdered; that she stayed at the apartment for approximately 20 minutes; and that she knew the defendant and did not see him at the apartment during that time period. Defendant's girlfriend, Barbara Baker, testified that defendant was at her house on the night of the murder.

Sergeant Clayton Jordan of LaPorte County testified that according to his records, Benjamin was housed in Cell Block 5 South of the county jail, while, at the same time, defendant was housed in Cell Block 5 South Central. He also said that inmates were not allowed to mingle with inmates from other cell blocks.

Following closing arguments, and a short deliberation, the jury found defendant guilty of murder. At the first phase of defendant's sentencing hearing, the only evidence presented was a certified copy of defendant's birth certificate, establishing that he was at least 18 years of age at the time the crime was committed. The State argued that the only issue at this phase of sentencing was the defendant's age, as the jury, by the nature of its verdict, had already determined that it was a "contract murder." Following deliberations, the jury found the defendant eligible for death penalty. At the second stage of the sentencing hearing, after the State presented evidence of defendant's prior convictions, and defendant presented mitigating evidence (including the testimony of a psychologist who said defendant had rehabilitative potential but an antisocial personality), the jury sentenced defendant to death.

PRETRIAL ISSUES

The first issue that defendant raises is whether or not a *Batson* violation occurred. During *voir dire*, the defense moved for a mistrial because the State had used peremptory challenges to excuse two of three potential African-American jurors who had been questioned. The trial court ruled that the defendant had established a *prima facie* case of racial discrimination under *Batson v. Kentucky* (1986), 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712.

The prosecutor explained that he excused potential juror Pearline McGee because of a "hunch" he had about her. He said that he guessed from the way that she answered the court's questions about her previous jury service that she had reached a verdict of "not guilty" in that trial. He also stated that McGee worked at the post office, and that he "had bad luck with post office employees being on juries."

Regarding potential juror Peter Reeves, the prosecutor stated that he excluded him because he was unemployed, and had been a resident at his current address for only five years, thus not having sufficient ties to the community. The prosecutor also said that Reeves failed to fill out his juror card completely. After hearing these explanations, the trial court held that the prosecutor did not arbitrarily exclude African-American potential jurors.

The question has been properly placed before this court, as the defendant objected to the potential jurors' exclusion at trial and in his post-trial motion for a new trial. The State argues that the trial court improperly concluded that defendant had established a *prima facie*

case of discrimination. This court has held that "the initial determination of whether a *prima facie* case has been established is left to the judgment of the trial judge, who is in a superior position to determine whether the prosecutor's exercise of peremptory challenges was motivated by group bias." (*People v. Evans* (1988), 125 Ill. 2d 50, 66-67.) Based on this court's extensive review of the record, no reason can be found not to defer to the trial court's judgment that a *prima facie* case had been established.

The issue then narrows down to whether or not the trial court erred in accepting the prosecutor's explanations for the peremptory challenges. The explanations the State gives must be "clear, reasonably specific, legitimate, and nonracial in order to dispel the presumption created by the *prima facie* case," and this court will usually give great deference to the trial court's findings. (*People v. Hope* (1990), 137 Ill. 2d 430, 467.) The trial court was clearly correct in determining that the prosecutor dismissed potential jurors McGee and Reeves for legitimate, nonracial reasons.

The prosecutor's explanation that he dismissed prospective juror McGee on the basis of her demeanor is sufficient. (See *People v. Young* (1989), 128 Ill. 2d 1, 20-21 (where the court found that a prosecutor's explanation, that he challenged a prospective juror because of his demeanor, was sufficient to rebut a *prima facie* violation of *Batson*).) The prosecutor's main problem with McGee was her demeanor in discussing a prior time when she served on a jury. Additionally, a close reading of the record shows that the prosecutor's remarks concerning McGee's

employment were meant as an afterthought and, thus, are of no consequence.

As to potential juror Reeves, the prosecutor's remarks, that he was concerned with his lack of ties to the community, is sufficient to rebut defendant's *prima facie* showing of a *Batson* violation. Unless the decision is against the manifest weight of the evidence, the question of whether or not the prosecutor was credible in offering his reasons is a question best left to the trial judge, who is in the best position to determine credibility. (*Hope*, 137 Ill. 2d at 467.) After reviewing the record, we find that the defendant did not meet his burden of showing that the trial court abused its discretion.

The defendant also argues that the trial court erred by excusing potential jurors who expressed reservations about capital punishment, and by refusing to further question a juror as to whether his attackers in a beating had been Africa-American. With the entire venire seated in the courtroom, the trial court asked that potential jurors who had reservations about the death penalty raise their hands. The trial judge then specifically questioned each of these potential jurors whether to dismiss them.

One of the potential jurors stated that he did not believe in capital punishment and would have great difficulty in voting for the death penalty. Then, the following colloquy between the trial judge and the potential juror took place:

> "PROSPECTIVE JUROR: Five years ago, I was a juror, and the same question [*sic*]. When I was examined whether I would be a proper juror. I was dismissed because the attorney felt I would not be qualified.

> THE COURT: Under the circumstances you feel you could not be fair and impartial because the death penalty may be imposed?
>
> PROSPECTIVE JUROR: I don't think I would be fair."

Over defense counsel objections, the trial judge excused this prospective juror.

A second potential juror stated that she did not believe that she could vote for the death penalty. When the trial judge asked her if she would automatically vote against the death penalty, she stated that she would, as a moral statement. Over defense counsel's objections, this potential juror was also excused.

> "*Witherspoon v. Illinois* (1968), 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770, prohibits the exclusion for cause of prospective jurors who express only general objections to the death penalty. In *Wainwright v. Witt* (1985), 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52, 105 S. Ct. 844, 852, the Court held that a juror may not be excused unless his or her views ' "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." ' " (*People v. Gacho* (1988), 122 Ill. 2d 221, 239.)

The trial court is in the best position to determine whether a prospective juror will be fair. As such, "deference must be paid to the trial judge who sees and hears the juror." *Wainwright v. Witt* (1985), 469 U.S. 412, 426, 83 L. Ed. 2d 841, 853, 105 S. Ct. 844, 853.

In the case of the first prospective juror, the trial court had ample reason to conclude that he would not fairly weigh the evidence as a consequence of his views

of the death penalty. His response is similar to that of prospective jurors in other cases who have been found to have been properly dismissed. See, *e.g.*, *People v. Gacho*, 122 Ill. 2d at 238-40 (when asked whether he would consider imposition of the death penalty, the prospective juror replied: "No, I would rather not"); *People v. Del Vecchio* (1985), 105 Ill. 2d 414, 431 (when asked whether he could impose the death penalty, the prospective juror stated: "I don't think I have a right to do that").

As to whether the trial court should have further questioned the second potential juror, prior to dismissing her, the issue has been waived, as defendant failed to raise it in his post-trial motion for a new trial. "*Both* a trial objection *and* a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial." (Emphasis in original.) *People v. Enoch* (1988), 122 Ill. 2d 176, 186.

Defendant also raises issues regarding the *voir dire* of juror Mark Armgardt. Armgardt said that he had been the victim of a beating five years earlier. The trial court refused defendant's request to ask him whether or not his assailant had been African-American. Defendant argued that because Armgardt may have been the victim of an interracial crime, he may be inclined to impose the death against an African-American defendant. Defendant raised his objection at trial, but failed to raise it in his post-trial motion for a new trial. Thus, on appellate review, as the issue does not rise to the level of plain error (107 Ill. 2d R. 615(a)), it is waived. *Enoch*, 122 Ill. 2d at 186.

TRIAL

As to errors committed during the trial, the defendant initially argues that the State failed to find him guilty beyond a reasonable doubt. In support of this contention he argues that because there is no physical evidence linking him to the crime, and because his alleged confession to Benjamin never took place, there was not enough evidence to convict him beyond a reasonable doubt.

> "A criminal conviction will not be set aside on review unless the evidence is so improbable or unsatisfactory that there remains a reasonable doubt of the defendant's guilt. [Citations.] It is not our function to retry a defendant when considering a challenge to the sufficiency of the evidence of his guilt. [Citations.] Rather, determinations of the credibility of witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence are responsibilities of the trier of fact." (*People v. Jimerson* (1989), 127 Ill. 2d 12, 43.)

Upon review, once a defendant is found guilty of a crime, all of the evidence is to be considered in a light most favorable to the prosecution. *People v. Collins* (1985), 106 Ill. 2d 237, 261, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 61 L. Ed.2d 560, 573, 99 S. Ct. 2781, 2789.

Applying the aforementioned principles to the instant case, we conclude that there was sufficient evidence to support the jury's verdict. Here, the essential issue is the credibility of Benjamin's testimony concerning defendant's admissions. Defendant argues: that it is unlikely that he (a member of Chicago's El Rukn street gang) would have confessed to Benjamin (an Indiana

native who was serving a short sentence for driving while intoxicated); that the physical evidence shows that the bullets remained in the victim's head, and if defendant had used a .357-caliber gun (as Benjamin testified that he did), then the bullets would have gone through Smith's head; that there was no evidence, other than Benjamin's testimony, of a contract; and that there were other inconsistencies in Benjamin's testimony.

The jury was exposed to all of the potential infirmities in Benjamin's testimony that defendant presents. The determination of credibility of witnesses and evidence is exclusively within the province of the jury, and the jury will resolve any conflicts (*Collins*, 106 Ill. 2d at 261-62.) As the jury was made fully aware of the infirmities of Benjamin's testimony and other circumstantial evidence pointing towards the defendant's guilt, we cannot say that its conclusions were unreasonable. Therefore, he was properly found guilty beyond a reasonable doubt.

The defendant next argues that he was denied a fair trial when the trial court granted the State's motion *in limine* which excluded any evidence that Elbert Dunnigan (a third party) had threatened Smith prior to the murder, and that he had the opportunity to convince Benjamin to lie and implicate the defendant in the murder. As an offer of proof, the defendant stated that Elbert Dunnigan had threatened Smith with a handgun one week prior to the murder, and that he, having been housed in the LaPorte County jail at the same time as Benjamin, had persuaded Benjamin to falsely implicate the defendant. The trial court then granted the State's motion *in limine*.

The trial court sustained the State's relevance objections when defendant asked Sergeant Clayton Jordan,

head of security for the LaPorte County jail, whether Benjamin and Dunnigan had been housed together in (or were even in the same cell block of) the jail. The trial judge also did not allow the testimony of Frank Brown. In an offer of proof, the defendant told the court: that Mr. Brown had known the defendant, Smith, and Dunnigan for a number of years; that Brown had seen Dunnigan threaten Smith in the past; and that while Brown was in the LaPorte County jail, Dunnigan had twice asked him to claim that the defendant had admitted to committing Smith's murder. The trial court also did not allow the defendant to call two witnesses who claimed to have seen Dunnigan threaten Smith.

The defendant's reliance on Brown's proffered testimony is misplaced because none of it was ever going to be introduced at trial because Brown invoked his fifth amendment right to refuse to testify based on the possibility of self-incrimination. Thus, the defendant's theory that Dunnigan had committed the murder is based solely on the testimony of one witness who would testify that she saw Dunnigan threaten Smith one week prior to the murder. The only other evidence implicating Dunnigan, in Smith's murder would have been the testimony of a jail guard as to the location of Dunnigan's cell at the LaPorte County jail.

"An accused * * * may attempt to prove that someone else committed the crime with which he is charged [citation], but this right is not without limitations." (*People v. Ward* (1984), 101 Ill. 2d 443, 455.) This court has long observed:

> "One accused of crime may prove any fact or circumstance tending to show that the crime

> was committed by another person than himself. [Citations.] It is, of course, difficult, in dealing with evidence of this character, to define the precise limits which must control its admission. If it is too remote in time to throw light on the fact to be found it should be excluded." (*People v. Nitti* (1924), 312 Ill. 73, 90.)

This court has also found that evidence should be excluded if it is too speculative. *People v. Dukett* (1974), 56 Ill. 2d 432, 450.

Defendant argues that under *Nitti*, evidence that Dunnigan had threatened Smith one week prior to the murder is highly relevant. The excluded evidence in *Nitti* showed that two weeks before his death, the victim had an argument with his son, when the victim refused to give him $500. The son had kicked and beat the victim until he was nearly unconscous. The evidence showed that the son then disappeared and did not reappear until a week later. The court found that this evidence was not too remote to be relevant. *Nitti*, 312 Ill. at 90.

However, in the instant case, there is far less evidence that links Dunnigan to the murder. The evidence that Dunnigan had threatened Smith shows a remotely speculative relationship, at best.

The testimony of Sergeant Jordan as to which cell block Dunnigan was in at the LaPorte County jail was also properly excluded. The fact that Dunnigan may have been incarcerated in the same cell block as Benjamin does not show that he persuaded (or even talked to) him about falsely implicating the defendant in Smith's murder. No other evidence linking Benjamin and Dunnigan had been offered. As earlier stated, speculative evidence may be

properly excluded at the discretion of the trial judge, and this evidence was speculative at best.

The defendant next contends that the trial court erred when it allowed two defense witnesses to refuse to testify for fear of self-incrimination, without determining whether the witnesses could have provided certain limited testimony without incriminating themselves.

Prior to trial, the State made a motion *in limine* to preclude Henry Evans from testifying. The trial court reserved judgment on the matter. At trial, the defendant informed the court that Evans had criminal charges pending against him in Cook County and that, according to him, an unknown representative of the State's Attorney's office had threatened him regarding his charges if he testified on behalf of the defendant. The defendant did not make an offer of proof as to what Evans would testify to, but he alluded that it would be to the aforementioned threats. The trial judge then called in Evans and his attorney. The judge examined Evans, and he then invoked his fifth amendment right not to testify based on the possibility of self-incrimination.

Defendant then attempted to call Frank Brown. After finding out that there were criminal charges pending against Brown in Cook County, and a warrant had been lodged against him in Indiana, the trial judge asked Brown if he wished to talk with separate counsel. After a meeting with appointed counsel and a second examination by the judge, Brown invoked his fifth amendment right not to testify based on the possibility of self-incrimination. The defendant then made an offer of proof that Brown would testify: that he has known defendant,

Smith, and Dunnigan for a number of years; that Dunnigan and Benjamin were housed in the same cell block at the LaPorte County jail; that he had knowledge that Dunnigan had threatened Smith; and that, on two occasions, Dunnigan asked him to falsely say that the defendant had committed the murder, in exchange for help in his Indiana armed robbery case.

We do not need to address this issue, as it was waived by the defendant. As to both Evans and Brown, the defendant failed to properly object at trial and to raise the issue in his post-trial motion. Therefore, the issue is waived on review. (*People v. Enoch* (1988), 122 Ill. 2d 176, 186.) The issue is also not plain error, as we have already determined that the evidence was not closely balanced, and any error was not of a magnitude to deny defendant a fair trial. *People v. Young* (1989), 128 Ill. 2d 1, 47.

Defendant next argues that he was deprived of his right to present a defense when the trial court informed Brown and Evans about the consequences to their pending cases if they testified on the defendant's behalf. As earlier noted, both Evans and Brown had cases pending against them in the circuit court of Cook County when they were called to testify for defendant. The trial court advised each of them of the consequences of testifying (as related to their own cases) and had each of them consult with an attorney. Both Brown and Evans then asserted their fifth amendment rights and refused to testify on behalf of the defendant.

The defendant has waived this issue due to his failure to timely object at trial as well as raise the issue with specificity in his post-trial motion. (*Enoch*, 122 Ill. 2d at

190.) Furthermore, the issue does not rise to the level of plain error, as we have already determined that the evidence was not closely balanced, and any error was not of such magnitude as to deny defendant a fair trial. *Young*, 128 Ill. 2d at 47.

The defendant also contends that the trial judge deprived him of his right to present a defense by admonishing two defense witnesses, Constance Smith and Harry Evans, as to the consequences of committing perjury, while the court did not similarly admonish any of the State's witnesses. The defendant argues that the trial judge's admonitions show that that court was biased against defense witnesses.

The defendant failed to raise the issue at trial or in his post-trial motion for a new trial. Therefore, the issue is waived. (*Enoch*, 122 Ill. 2d at 190.) The waiver rule serves an important public policy because a timely objection will allow the circuit court to correct any errors and "a party who fails to object cannot obtain the advantage of receiving a reversal by failing to act." (*People v. Reid* (1990), 136 Ill. 2d 27, 38.) This issue does not rise to the level of plain error since we have already determined that the evidence was not closely balanced and the alleged error was not of a magnitude as to deny the defendant a fair trial. *Young*, 128 Ill. 2d at 47.

The defendant next argues that the trial judge's behavior towards defense counsel had the effect of denying him a fair trial. Defendant gives numerous examples in which he alleges that the trial court acted improperly: by displaying hostility to defendant's attorneys; by belittling defendant's attorneys; by conducting an in-court

identification of the defendant; by arguing evidentiary objections before the jury; and by questioning defense witnesses. The State argues that defense counsel was treated fairly and cites the following examples as evidence that the trial judge did not treat the defendant unfairly: sustaining defendant's objections; admonishing the prosecutor; allowing defendant a continuance to obtain a transcript; and allowing defendant's untimely filed *pro se* motion.

The defendant has waived these issues by not objecting to them at the time the improper actions took place. Furthermore, defendant's post-trial motion contained merely vague, general allegations of error. This court has held that both a contemporaneous objection and a specific allegation in a post-trial motion are necessary to preserve an error for review. (*Enoch*, 122 Ill. 2d at 190.) We additionally find that since the evidence in this case has already been found not to be closely balanced, and the alleged errors were not of a magnitude as to deny defendant a fair trial, they are not plain error. *Young*, 128 Ill. 2d at 47.

The defendant next contends that Lashone Joyner's testimony, that Smith had told her that if anything happened to him, he would be with defendant, was inadmissible hearsay.

Defendant's arguments regarding the testimony in question, references to the testimony by the prosecution in closing argument, and the absence of a relevant limiting instruction have all been waived. (See, *e.g.*, *People v. Thomas* (1990), 137 Ill. 2d 500, 524.) The defendant did not object to Joyner's testimony at trial and did not raise the

issue in a post-trial motion, thus waiving objections. (*Enoch*, 122 Ill. 2d at 186.) The defendant did object following the prosecutor's second reference to Joyner's testimony, but he did not set forth this error with specificity in his motion for a new trial, and thus waived that objection on review. (*Enoch*, 122 Ill. 2d at 190.) The defendant also failed to tender a limiting instruction regarding Joyner's testimony, so he cannot raise the issue on appeal. (*People v. Huckstead* (1982), 91 Ill. 2d 536, 543.) Finally, the issue will not be addressed as plain error because we have already found that the evidence was not closely balanced, and any error was not of a magnitude as to deny the defendant a fair trial. *Young*, 128 Ill. 2d at 47.

The defendant also contends that Detective Robertson's testimony, that he had a conversation with Milbon Lockridge ("Poncho") about defendant's case and thus subsequently began searching for him, was erroneously admitted, violating his right of confrontation under the sixth amendment. We find that those statements were not inadmissible hearsay, and therefore were properly admitted.

At trial, Detective Robertson testified as follows: that in early April 1986, while working on an unrelated case, he spoke with Lockridge about decedent's murder; that he then took Lockridge for an interview with an assistant State's Attorney; that after the interview, he and the assistant State's Attorney brought Lockridge to the grand jury; that later that same day he was assigned to the murder case; that later that month he obtained a warrant for defendant's arrest for the murder of Smith; and that he later learned that the defendant was in the LaPorte County jail, and he lodged the warrant there.

At no time did Detective Robertson testify as to the substance of any of the statements Lockridge had made to him. Defendant, however, argues that Robertson's testimony inferentially revealed that Lockridge had implicated the defendant in the murder.

This court resolved this issue in *People v. Gacho* (1988), 122 Ill. 2d 221, 248-49. In that case, this court held:

> "Had the substance of the conversation that Coakley [the detective] had with Infelise [the witness] been testified to, it would have been objectionable as hearsay. The testimony of Coakley, however, was not of the conversation with Infelise, but to what he did and to investigatory procedure. (*People v. Williams* (1977), 52 Ill. App. 3d 81, 87-88; see also *People v. Wright* (1974), 56 Ill. 2d 523.) As our appellate court stated in considering similar testimony, 'Such testimony is not hearsay because it is based on the officers' own personal knowledge, and is admissible although the inference logically to be drawn therefrom is that the information received motivated the officers' subsequent conduct.' " *Gacho*, 122 Ill. 2d at 248, quoting *People v. Hunter* (1984), 124 Ill. App. 3d 516, 529.

Defendant argues that *Gacho* is distinguishable from the instant case because in *Gacho* the police officer spoke with a victim of the crime, while in this case the officer spoke with a codefendant. We find the defendant's argument to be lacking in persuasiveness because, in both *Gacho* and the instant case, the officer's testimony did not contain hearsay, and simply showed the conduct of the officer's investigation.

The defendant next contends that the trial court improperly precluded his alibi witness, Barbara Baker, from testifying, where the defendant's discovery responses indicated that he would present an alibi and separately showed that Baker would testify. Baker testified that the defendant had been at her house at about 8 p.m. on the night of the murder. The prosecutor then objected when defense counsel asked her how long the defendant was with her, because defense counsel had not notified them of this alibi. According to the prosecution, the defendant had provided them with a different alibi defense, requiring the testimony of a different witness.

In response, defense counsel explained that two witnesses had told them that they would testify regarding the defendant's alibi. The night before Baker's testimony, one of the witnesses told defense counsel that she had been lying, whereupon they decided to use Baker as an alibi witness. Defense counsel's excuse for informing the prosecution that they were changing the alibi defense and witness was that they "overlooked in [their] rush saying anything today" because they were "busy doing things in the trial this morning."

The trial judge ruled that he would preclude Baker from testifying because there was no way for the prosecution, at that late date, to effectively assemble and present rebuttal evidence, and because he felt it was clear that the defense counsel knew of the alibi testimony in question, but deliberately withheld disclosing the information during the hearing on the State's motion *in limine* prior to Baker's testimony, choosing rather to surprise the prosecution during Baker's direct examination.

In pertinent part, Supreme Court Rule 413 states:

> "Subject to constitutional limitations and within a reasonable time after the filing of a written motion by the State, defense counsel shall inform the State of any defenses which he intends to make at a hearing or trial and shall furnish the State with the following material and information within his possession or control:
>
> (i) the names and last known addresses of persons he intends to call as witnesses * * *
>
> * * *
>
> (iii) and if the defendant intends to prove an alibi, specific information as to the place where he maintains he was at the time of the alleged offense." 107 Ill. 2d R. 413(d).

Additionally, Supreme Court Rule 415 provides, in part:

> (b) Continuing Duty to Disclose. If, subsequent to compliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, he shall promptly notify the other party or his counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall be notified.
>
> * * *
>
> (g) Sanctions.
>
> (i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances." 107 Ill. 2d R. 415.

Under Rule 413(d)(iii), the defendant had an obligation, prior to trial, to reveal to the prosecution his alibi, that he was with Baker at the time of the murder, prior to trial. He did not reveal this information in the pretrial discovery. Pursuant to Rule 415(b) the defendant had a continuing duty to promptly notify the State or trial court (if discovered during trial) as to a new alibi. The defendant clearly did not meet his obligation, thus violating Rules 413 and 415.

The only matter, with respect to this issue, left to be decided is whether the trial court abused its discretion in precluding Baker from testifying. The trial court was clearly acting within its discretion, as Rule 415(g)(i) specifically authorizes a trial court to exclude evidence as a sanction. See, *e.g.*, *People v. Partee* (1987), 157 Ill. App. 3d 231, 252-53 (court found that the trial court acted within its discretion when it excluded the testimony of an alibi witness where the *pro se* defendant did not disclose specific information concerning the alibi, in violation of Rule 413(d)(iii)).

The defendant argues that the sanction of preclusion was too harsh, as the trial court could have applied a lesser sanction. This issue was discussed in *Taylor v. Illinois* (1988), 484 U.S. 400, 98 L. Ed. 2d 798, 108 S.Ct. 646. In

Taylor, on the second day of trial, the defense attorney made an oral motion to amend his discovery answers to include two additional witnesses. Upon inquiry from the trial judge as to why the motion should be granted, counsel represented that he had just been informed about these witnesses. The following day, the first witness appeared for an offer of proof and revealed that he had actually met with defense counsel a week before the trial started. The trial judge then did not allow either of the witnesses to testify due to defense counsel's blatant violation of discovery rules.

The Supreme Court affirmed the trial court's exclusionary sanction. (*Taylor*, 484 U.S. at 402, 98 L. Ed. 2d at 806, 108 S.Ct. at 648-49.) The Court reasoned that the sanction of preclusion serves an important purpose, noting:

> "One of the purposes of the discovery rule itself is to minimize the risk that fabricated testimony will be believed. Defendants who are willing to fabricate a defense may also be willing to fabricate excuses for failing to comply with a discovery requirement. The risk of a contempt violation may seem trivial to a defendant facing the threat of imprisonment for a term of years. A dishonest client can mislead an honest attorney, and there are occasions when at attorney assumes that the duty of loyalty to the client outweighs elementary obligations to the court." *Taylor*, 484 U.S. at 413-14, 98 L.Ed.2d at 813, 108 S.Ct. at 655.

In this case, the trial court obviously felt that preclusion was the only effective sanction. That decision was

clearly within its discretion, and we cannot find that the trial court abused that discretion.

In regards to Baker's testimony, the defendant also contends that the trail court erred when it struck all of her testimony. The defendant argues that Baker's testimony, that she saw Smith sell drugs and use cocaine, was relevant, because the bag of powder found near Smith's body was not a controlled substance. He argues that this testimony would help to establish his theory that Smith had been murdered by a disgruntled drug buyer whom he had attempted to defraud.

The State argues that the defendant has waived this issue. However, contrary to the State's allegations, the defendant has preserved this issue for review, pursuant to *Enoch*. Immediately after striking Baker's testimony, the trial court adjourned for the day. The next morning, the defendant objected to the striking of Baker's testimony immediately prior to the resumption of the trial. Thus, he complied with the contemporaneous-objection requirement. Additionally, he alleged that the striking of Baker's entire testimony was error in his post-trial motion. As his objection was actually to the striking of the *entire* testimony, this was as specific as defendant could get. Thus, he was able to preserve the error for review, by meeting the requirement that the error be objected to specifically in a post-trial motion. *Enoch*, 122 Ill. 2d at 186.

Following the State's objection to the use of Baker as an alibi witness and in the presence of the jury, the trial court stated:

> "Ladies and Gentlemen, I would like to advise you that certain testimony of the witness is to be disregarded, it is to be stricken, you are not to consider it, you are not to draw any inferenced from it or speculate any further consideration of the testimony that this witness has given."

It is patently clear, from looking at this statement in the context it was given, that the trail judge was simply instructing the jury not to consider Baker's testimony as it related to defendant's alibi.

Furthermore, defendant invited the error and cannot now complain of it on appeal. (See, *e.g.*, *People v. Miller* (1983), 120 Ill. App. 3d 495, 501 (defendant invited error by failing to request that the trial court *voir dire* the jury about a newspaper article discovered in the possession of one of the jurors, as that is the most frequently utilized method of avoiding an error).) Here the day following the occurrence of the alleged error, the defendant made an oral motion for a new trial, contending that the trial judge struck all of Baker's testimony. The trial judge denied the motion. The defendant could have then asked that the court reporter read the complained-of remarks, so that the trial court could clarify its position. He did not make this request, thus allowing the jury to continue to labor under what he perceived to be the belief that it was not to consider any of Baker's testimony. As the defendant invited the error, his objection is waived on review.

Defendant next contends that he was denied his due process right to a fair trial because the prosecutor made five allegedly improper comments during closing argument. At the outset, it should be noted that prosecutors

have a great deal of latitude in making closing arguments (*People v. Morgan* (1986), 112 Ill. 2d 111, 131; *People v. Stock* (1974), 56 Ill. 2d 461, 467), and the trial court's determination as to the propriety, and possible prejudicial effect, of the prosecutor's closing argument will be followed, absent a clear abuse of discretion. (*People v. Smothers* (1973), 55 Ill. 2d 172, 176.) In order for a remark to be deemed reversible error, the complained-of remark must have resulted in substantial prejudice to the accused, such that the verdict would have been different had it not been made. (*Morgan*, 112 Ill. 2d at 132.) "In reviewing allegations of prosecutorial misconduct, the closing arguments of both the State and the defendant must be examined in their entirety and the complained-of comments must be placed in the proper context." *People v. Cisewski* (1987), 118 Ill. 2d 163, 175-76.

The first alleged error is that the prosecutor improperly remarked, four times, that the defendant was smiling as he sat at the defense table. The first two references in question were as follows:

> "[ASSISTANT STATE'S ATTORNEY]: Detective Robertson explained to you about the El Rukns street gang, about their temple at 39th and Drexel, about General B-bop, about Poncho and about Derrick Morgan. And he can sit there and smile at you ladies and gentlemen, but don't let that intimidate you, you sworn [sic] to take an oath –
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: Objection overruled.

[ASSISTANT STATE'S ATTRONEY]: You have been sworn to take an oath, you sit here as Jurors and you have an obligation to listen to the evidence despite whatever the Defendant has a right to do here in Court.

[DEFENSE COUNSEL]: Objection, your Honor, the Defendant didn't try to do anything here in Court. I object to this line of argument.

THE COURT: The objection is overruled, it will stand. The jury has an opportunity to observe and if in fact there are any statements made by either side that are not consistent with what is happening in this Courtroom they will disregard it completely. Accordingly you may continue with your statement."

It is clear from the preceeding remarks that the prosecutor was not referring to the defendant's demeanor. These comments were not error.

Later, it was argued:

"[ASSISTANT STATE'S ATTORNEY]: Again, how would Benjamin know unless this man, this smiling man here today told him that is what happened.

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Objection sustained. Mr. Gambony [the Assistant State's Attorney], you may comment on evidence but I ask you to refrain from any other tactics. Proceed from there."

Because the trial court sustained the defendant's objections in the presence of the jury, any arguable error from the prosecutor's references to the defendant's smiling

was cured. Further, the defendant did not request that the trial judge instruct the jury or declare a mistrial. (*People v. Hooper* (1989), 133 Ill. 2d 469, 488.) The jury was further instructed that the closing arguemtns were not evidence. (*Hooper*, 133 Ill. 2d at 492.) Thus, any possible error that may have been brought about by the prosecution's references to the defendant's smiling was harmless, and thus not cause to reverse the judgment. *People v. Caballero* (1989), 126 Ill. 2d 248, 273.

The defendant also argues that comments by the prosecutor that the jury should support Benjamin for coming forward to testify were prejudicial. He argues that this comment appealed to the passions and prejudices of the jury by asserting that, without this jury's support, witnesses in future cases would not come forward to testify. Although the defendant objected at trial, he failed to specifically set forth this error in his post-trial motion, thus waiving the issue on appeal. (*People v. Fields* (1990), 135 Ill. 2d 18, 59-60.) We will also not examine the issue as plain error, as the evidence was not closely balanced and the remarks were not so inflammatory as to deny the defendant a fair trial. *Fields*, 135 Ill. 2d at 60.

The defendant's third point of error in the prosecutor's closing argument is that the prosecutor improperly commented about Benjamin's courage in testifying. Defendant argues that this was improper because no evidence was presented that Benjamin was in any danger. This point of error has been waived, as the defendant failed to object at trial, and did not raise it in his post-trial motion. (*Fields*, 135 Ill. 2d at 59-60.) The point of error is also not plain error, as we have already found that the evidence was not closely balanced and the remark was

not so inflammatory as to deny the defendant a fair trial. *Fields*, 135 Ill. 2d at 60.

The defendant's next point of error is that the prosecutor prejudicially commented that no eyewitnesses to the murder came forward because he had threatened or intimidated them. There was no evidence in the record that the defendant had threatened witnesses, or that there even were eyewitnesses to the murder. This point of error is waived because it was not specifically raised in the defendant's post-trial motion. (*Fields*, 135 Ill. 2d at 59-60.) Further, as we have already determined that the evidence in this case was not closely balanced, and because the remarks were not so imflammatory as to deny the defendant a fair trial, the error does not rise to the level of plain error. *Fields*, 135 Ill. 2d at 60.

Concerning the prosecutor's closing argument, the defendant's final point of error is that the prosecutor referred to defense counsel's closing argument as "the mad rambling of a defense attorney," and "ridiculous" (twice). As to the two complained-of comments that defense counsel's argument was "ridiculous," the error, in the first instance, is waived because the defendant failed to object to it at trial and raise it in his post-trial motion. (*Fields*, 135 Ill. 2d at 59-60.) The second complained-of comment is also waived because defendant failed to include it in his post-trial motion. (*Fields*, 135 Ill. 2d at 59-60.) Additionally, this alleged error does not rise to the level of plain error, as we have already determined that the evidence was not closely balanced, and the remark was not so inflammatory as to deny the defendant a fair trial. *Fields*, 135 Ill. 2d at 60.

As to the prosecutor's comment that the defense counsel's argument was "mad ramblings," defendant's objection was immediately sustained in front of the jury. The trial court further said:

> "I ask you to refrain from using any such terminology. I heard no ramblings, he presented his case as he saw fit and I ask you refrain from making such comment."

Thus, any error in the statement was cured by the trial court, and since we are persuaded that there was ample evidence to find the defendant guilty, the remark was not error. *Cisewski*, 118 Ill. 2d at 178.

Contrary to the defendant's contention, this remark is different from the one in *People v. Monroe* (1977), 66 Ill. 2d 317, where this court found that a prosecutor's comments that a defendant's closing argument was "preposterous" and "fraudulent," coupled with his expression of his opinion of the defense, was reversible error. (*Monroe*, 66 Ill. 2d at 323-24.) Rather, this case is more closely analogous to *People v. Cantrell* (1977), 55 Ill. App. 3d 270, where the court found that a sustained objection was enough to cure the prosecutor's comment that some of the defense counsel's cross-examination was "meaningless garbage talk." (*Cantrell*, 55 Ill. App. 3d at 275.) As in *Cantrell*, the prosecutor's comments in the instant case, coupled with the trial court's admonishment, do not rise to the level of reversible error.

The defendant next contends that the trial court erred by not allowing him to call Detective Robertson as his own witness in order to impeach him with his police report (taken from his conversation with Benjamin at the

LaPorte County jail). He argued that the police report stated that Benjamin told Robertson that he had his conversation with the defendant two or three days before Memorial Day 1986, and not in mid-May 1986, and that the police report would seriously impeach Benjamin's testimony as to when the conversation occurred, thus impeaching his entire testimony.

The State maintains that because Benjamin admitted, on direct examination, that he may have originally told the police that his converstiaon with the defendant took place in late May, as opposed to mid-May, and because the discrepancy as to when the conversation occurred was a collateral matter, the trial court properly precluded the defendant from calling Robertson for the purpose of impeaching him with his report.

The trial court's reasoning for holding that the defendant could not impeach Robertson with his own report was that a party cannot impeach his own witness. Initially, it should be noted that the trial court erred in telling defense counsel that a party in a criminal case cannot call a witness solely to impeach that witness. Under Supreme Court Rule 433, the examination of a hostile witness in a criminal case is governed by Supreme Court Rule 238. (107 Ill. 2d Rules 433, 238.) Furthermore, under Supreme Court Rule 238(a), "[t]he credibility of a witness may be attacked by any party, including the party calling him." (107 Ill. 2d R. 238(a).) Nevertheless, as a reviewing court, we can sustain the decision of a trial court for any appropriate reason, regardless of whether the trial court relied on those grounds and regardless of whether the trial court's reasoning was correct. See *Bell v. Louisville & Nashville R.R. Co.* (1985), 106 Ill. 2d 135, 148.

Whether Benjamin had his conversation with the defendant in mid-May 1986, or a few days before Memorial Day 1986, is plainly collateral to the case at hand. As the appellate court has noted, Supreme Court Rule 238 "does not grant permission to try collateral issues in order to prove the unreliability or untruthfulness of the witness." (*People v. Jones* (1986), 148 Ill. App. 3d 345, 351.) Thus, as the trial court could have based its exclusion on the "collateral issues" principle, the trial court's exclusion of Robertson, solely for the purpose of impeachment, was proper.

Defendant next contends that his due process rights were violated when the trial court refused to grant his request for a hearing on his oral motion to suppress the in-court identification by Benjamin. He argued that one of the prosecuting attorneys had brought Benjamin into the courtroom prior to his testimony, and pointed out the defense attorneys to him. In response, the prosecutor argued that Benjamin had previously identified the defendant from a photo array.

Benjamim testified that, when he originally spoke with the police about this case, he identified defendant's phototgraph from a photo array, and signed that photo. At trial, he picked the same photo out of a photo array shown to him, and identified his signature.

There is no *per se* rule that, under the due process clause of the fourteenth amendment, a trial court must hold a hearing outside the presence of the jury on the admissibility of identification testimony. (*Watkins v. Sowders* (1981), 449 U.S. 341, 66 L.Ed. 2d 549, 101 S.Ct. 654.) Furthermore, "[i]t is the reliablilty of identification

evidence that primarily detemines its admissibility." (*Watkins v. Sowders*, 449 U.S at 347, 66 L. Ed. 2d at 555, 101 S. Ct. at 658.) An in-court identification need not be suppressed if the prosecution can show a sufficiently reliable, independent basis for the identification.

The trial court's denial of defendant's request for a hearing was proper, as the prosecutor clearly established that there was an independent bases for Benjamin's in-court identification: Benjamin's previous identification of the defendant from a photo array. Additionally, the defendant did not complain that the earlier photo identification was impermissible suggestive.

The case of *United States v. Davies* (7th Cir. 1985), 768 F.2d 893, is instructive because, in that case, the defendant complained that the in-court identification was unnecessarily suggestive. At the three tables in the courtroom, there were only three males and, according to the defendant, only he vaguely resembled the description that the witness had earlier given. The court found that the in-court identification was properly admitted because the witness had previously picked the defendant's picture out of a photo array. Thus, the likelihood of a misidentification in court was reduced. *United States v. Davies*, 768 F.2d at 903-04; see also *United States v. Mills* (11th Cir. 1983), 704 F.2d 1553, 1564 (court found that denial of a request for an *in camera* hearing was proper, when the prosecution had established a sufficient, independent basis to show that the in-court identification was correct).

The defendant next argues that the trial court erroneously excluded some evidence, and erroneously admitted other evidence. Because the defendant really raises

four different claims, this court will examine each claim separately.

Initially, the defendant argues that the trail court erroneously excluded evidence that there was large amount of drug traffic in the vicinity of the apartment where Smith's body was found. He argues that this evidence would help to strengthen his theory that Smith, a known drug dealer, was murdered during a drug deal, by someone other than the defendant.

While a defendant in a criminal case may, certainly, attempt to prove any set of facts that tend to show that someone else committed the crime with which he is accused (*Ward*, 101 Ill. 2d at 455), such evidence should be excluded if it is too remote or too speculative (*People v. Dukett* (1974), 56 Ill. 2d 432, 450). The admission of such evidence lies "within the sound discretion of the trial court, and its ruling should not be reversed absent a clear showing of abuse of that discretion." *Ward*, 101 Ill. 2d at 455-56.

Defendant's argument, that an unknown third person may have killed Smith during a drug deal gone bad, based purely on the fact that there is a great deal of drug traffic in the area where the body was found, is incredibly speculative. Clearly the trial court's ruling such evidence inadmissible was not an abuse of discretion.

The defendant also argues that the trial court improperly permitted Shone Joyner (Smith's girlfriend) to testify that she was pregnant on the night of the murder, and also improperly admitted photographs of Smith.

During direct examination, the prosecutor asked Joiner about her condition at the time of the murder and she stated that she was pregnant. Defendant objected, and the trial judge sustained the objection, specifically admonishing the jury to disregard Joyner's remark. On cross-examination, Joyner said that on the night of the murder, she did not tell the police that B-Bop and Poncho had stopped by the apartment. On redirect examination, she stated that she was pregnant and in a state of shock on the night of the murder, and that is why she forgot to tell the police about B-Bop and Poncho.

It is well settled that a party, on redirect examination, is allowed to question a witness as to matters brought out during cross-examination, and questions may be asked which are designed to remove unfavorable impressions or references raised by cross-examination. (See, *e.g.*, *People v. Chambers* (1989), 179 Ill. App. 3d 565, 577.) Furthermore, the scope of redirect examination is within the sound discretion of the trial judge. (*People v. Davis* (1981), 92 Ill. App. 3d 426, 428.) In this case, the prosecutor asked question about Joyner's condition on the night of the murder, so as to remove any unfavorable impressions the may have resulted from her cross-examination testimony. Any references that the prosecution brought out about her pregnancy were clearly elicited to help explain why she was in such a state of shock that she forgot to tell the police about B-Bop's and Poncho's visit to her apartment.

Defendant also objects to the admission of "life" photographs of Smith. At trial, Marcia Alexander testified as follows: that she was Smith's sister; that she had last seen Smith alive approximately two weeks before the murder; and that, on the night of the murder, she viewed Smith's

body at the Cook County morgue. At this point it was stipulated that if she were shown People's Exhibit No. 1 for identification, she would identify it as a picture of her brother when he was alive. It was further stipulated that she would identify People's Exhibit No. 2 for identification, as a picture of her brother as he looked deceased. Over defendant's objection, People's Exhibits Nos. 1 and 2 were admitted into evidence and submitted to the jury.

The decision whether or not to allow the introduction of photographs of a decedent in a murder trial is within the sound discretion of the trial court (*People v. Lefler* (1967), 38 Ill. 2d 216, 221), and when photographs are necessary to establish any fact in issue, they are relevant (*People v. Speck* (1968), 41 Ill. 2d 177, 202). In the instant case, as in *Speck*, the photographs were admitted to prove part of the *corpus delicti* of the murder, as well as to corroborate the testimony of the "life and death" witness, Marcia Alexander. (*People v. Lindgren* (1980), 79 Ill. 2d 129, 143-44.) The evidence was admissible despite the defendant's stipulation that Alexander would properly identify the photographs. As this court noted in *Speck*, wherein the defendant offered to stipulate as to the identity of the deceased girls:

> "the defendant pleaded not guilty and the State had the right to prove every element of the crime charged an was not obligated to rely on the defendant's stipulation." *Speck*, 41 Ill. 2d at 201.

On appeal, the defendant attempts to characterize the photographs, as well as the evidence regarding Joyner's pregnancy, as prejudicial victim impact evidence. However, contrary to his assertion, "every mention of a

deceased's family does not *per se* entitle the defendant to a new trial." (*People v. Hope* (1986), 116 Ill. 2d 265, 276.) In support of his contentions, the defendant relies on two appellate court cases. Both cases are distinguishable, and therefore not applicable to the instant case. In *People v. Johnson* (1976), 43 Ill. App. 3d 649, 659, the court held that evidence that the complainant and her husband had separated following her rape was harmless given the strength of the State's case. In *People v. Starks* (1983), 116 Ill. App. 3d 384, not only irrelevant victim impact testimony elicited, but the prosecutor also relied on that testimony in his closing argument. Thus, the evidence concerning Joyner's pregnancy, as well as the photographs of Smith, were properly admitted.

Defendant's final contention of error at the guilt phase of his trial is that the trial court improperly precluded him from arguing during closing argument that he could not have confessed to Benjamin because they were housed in different cell blocks. At trial, defense counsel made the following argument:

> "You remember Sergeant Jordan took the stand, he was in charge of the jail at that time and he told you that people in 5 south central have access with each other during certain hours, the cells are open but he also said they were not free to mingle with people from 5 sooth [sic] or from other cell blocks so the activity was within the cell block. He also said Derrick Morgan was in 5 south the entire period of time he was there and particularly around Memorial Day when Benjamin was in 5 south central.

> [ASSISTANT STATE'S ATTORNEY]: Objection.
>
> THE COURT: Objection is sustained, misstating facts in evidence."

Sergeant Jordan actually testified as follows: that inmates from different cell blocks were not allowed to mingle; that in April of 1986, defendant and Benjamin were both housed in Cell Block 5 South Central; and that he had no personal recollection of where, during May of 1986, Benjamin was located. Therefore, since Jordan did not testify that the defendant and Benjamin were in different cell blocks in May of 1986, Benjamin's testimony that he was in the same cell block as the defendant during that time period is uncontradicted. As any argument to the contrary of Benjamin would not have been based upon evidence in the record (or a legitimate inference therefrom), the trial court's ruling that the argument was proper was not only not prejudicial, but it was also manifestly correct. Therefore, we affirm the defendant's murder conviction.

THE SENTENCING HEARING

The defendant initially contends that he was not eligible for the death penalty because the State failed to prove beyond a reasonable doubt that he committed a "contract" killing. The state argues that it did properly prove the *corpus delicti* of the contract killing.

In order for a defendant to be eligible for the death penalty, the State must prove beyond a reasonable doubt that a statutory aggravating factor exists. (Ill. Rev. Stat.

1987, ch. 38, par. 9-1(f).) Accordingly, in this case, the State had to prove that:

> "the defendant committed the murder pursuant to a contract, agreement or understanding by which he was to receive money or anything of value in return for committing the murder * * *." Ill. Rev. Stat. 1987, ch. 38, par. 9-1(b)(5).

In the instant case, this aggravating factor was shown by Benjamin's testimony that the defendant had admitted that he killed Smith for money. The defendant argues that his admission to Benjamin does not constitute sufficient evidence to prove that a contract killing did occur.

A defendants' confession alone is not enough to prove the *corpus delicti* of a crime. (*People v. Lambert* (1984), 104 Ill. 2d 375, 378.)

> "There must be either some independent evidence or corroborating evidence outside of the confession which tends to establish that a crime occurred. (*People v. Willingham* (1982), 89 Ill. 2d 352, 360.) If there is such evidence, and that evidence tends to prove that the offense occurred, then that evidence, if it corroborates the facts contained in the defendant's confession, may be considered together with the confession to establish the *corpus delicti*." (*Lambert*, 104 Ill. 2d at 378-79.)

However, once there is a showing of corroboration, there is no need to ignore the confession in determining whether the *corpus delicti* has been established. *People v. O'Neil* (1960), 18 Ill. 2d 461, 464.

In this case, the State proved a good deal of corroborating evidence. The Stated [sic] showed that on the day

of the murder, defendant's fellow El Rukn accomplices, Evans and Lockridge, came looking for Smith at his apartment; that later that same evening, the defendant went to Smith's apartment, and the two left together; and that when Smith's body was found 45 minutes later, there were numerous gunshot wounds to the head, and a bag of white powder next to the body. Thus, it is clear that the killer took elaborate steps to ensure that Smith was dead.

The elaborate nature of the crime helped to bolster and explain the defendant's admission to Benjamin: he had Evans, an El Rukn general, oversee the murder; he resorted to trickery to lure Smith to the vacant apartment; and he fired numerous shots into Smith's head to ensure that he would die. After viewing this evidence in a light most favorable to the prosecution, it is clear that the jury could have found that the defendant killed Smith pursuant to a contract, beyond a reasonable doubt. *Young*, 128 Ill. 2d at 48-50.

Defendant next contends that he was denied a fair and accurate sentencing hearing when the jury was allowed to consider testimony that Smith's girlfriend, Lashone Joyner, was pregnant on the night of the murder, as well as photographs of Smith with a woman and three children. The evidence of the pregnancy and all of the life photographs of Smith were admitted during the guilt phase of the trial, and have previously been found by this court to be proper. The jury, at both phases of the sentencing hearing, was properly instructed and allowed to consider the evidence presented at the guilt phase of the trial. Illinois Pattern Jury Instructions, Criminal, Nos. 7B.03, 7C.02 (2d ed. Supp. 1989).

The defendant also raises three errors concerning the State's closing argument at the sentencing phase. The first error that the defendant alleges is that the prosecutor misstated the law by telling the jury that its guilty verdict was dispositive of the issue of whether or not the murder was committed pursuant to a contract. The second point of error is that the prosecutor made improper comments to the effect that the defendant bore the burden of proving that the murder was not a contract killing. His final contention of error in the prosecutor's closing argument is that he argued that the defendant "enjoyed" killing people.

These alleged errors have all been waived because the defendant failed to object at trial or raise the issues in his post-trial motion. (*Fields*, 135 Ill. 2d at 59-60.) Furthermore, the issue will not be addressed as plain error because, as we have already found, the evidence in this case is not closely balanced, and the alleged errors are not of such magnitude as to have denied the defendant a fair sentencing. *Young*, 128 Ill. 2d at 47.

The defendant next asserts that he was denied a fair sentencing hearing, at both stages, because the trial court excluded the testimony of Barbara Baker and Sergeant Clayton Jordan. He claims that Baker would have testified that she saw Elbert Dunnigan threaten Smith, with a gun, one week before the killing. He also claims that Jordan would have testified that Dunnigan and Benjamin were housed in the same cell block at the LaPort County jail. The defendant asserts that this testimony would bolster his theory that Dunnigan had somehow persuaded Benjamin to falsely implicit him. He argues that this

evidence was relevant at both stages of his sentencing hearing, because it tends to show his innocence.

At the first stage of a sentencing hearing, only evidence having a direct impact on the statutory prerequisites for the death penalty should be admitted. (*People v. Brisbon* (1985), 106 Ill. 2d 342, 371.) A defendant's evidence that someone else committed the crime with which he is charged should be excluded if it is too remote (*Ward*, 101 Ill. 2d at 455), or if it is too speculative (*Dukett*, 56 Ill. 2d at 450).

As defendant admits, both pieces of evidence go to the question of whether or not he actually committed the crime, and not whether any aggravating factors for the death sentence exist. Thus, due to the nature of the evidence, the trial court did not abuse its discretion in not allowing the defendant to present it at the first stage of his sentencing hearing.

The defendant further argues that he should have been permitted to offer this evidence at the second stage of his sentencing hearing so that the jury could consider "residual doubt." Defendant's position, concerning "residual doubt," is not supported by the case, as this court recently noted:

> "[T]he Supreme Court specifically rejected the claim that defendants convicted of capital crimes have a constitutional right to demand that the jury consider 'residual doubts' over guilt at the sentencing phase. [Citation.] The Court stated that 'residual doubt' over a defendant's guilt is not a 'mitigating circumstance' because it is not a fact about the defendant's character or the circumstances of his crime

> which may call for a penalty less than death. Accordingly, the Court concluded that the rule that a sentencer may not be precluded from considering any relevant mitigating circumstance did not require consideration of 'residual doubt' over defendant's guilt at the sentencing hearing." *Fields*, 135 Ill. 2d at 67, citing *Franklin v. Lynaugh* (1988), 487 U.S. 164, 172, 101 L. Ed.2d 155, 165, 108 S.Ct. 2320, 2327.

This evidence was properly excluded at the guilt phase of the trial. Thus, according to the aforementioned principles, the trial court did not act improperly in not allowing the jury to hear this highly speculative evidence at the second stage of the sentencing hearing.

The defendant next argues that his sentence should be vacated and his cause remanded for a new sentencing hearing because the trial judge, during *voir dire*, misled the jurors into believing that they would not actually be sentencing the defendant to death, by informing the venire that they would only "recommend" the death penalty.

The same issue came before this court in *People v. Perez*, (1985), 108 Ill. 2d 70, where the defendant argued that his death sentence should be reversed because the trial court "repeatedly" misinformed the jurors that they would "recommend" whether the death penalty should be imposed. The court noted that the record did not support an inference that the jurors were misled into believing that the responsibility for imposing the death penalty lay elsewhere. The jurors were informed (both verbally and in written instructions) that if they sign the

verdict form, the trial court *must* sentence the defendant to death. *Perez*, 108 Ill. 2d at 90-91.

The defendant argues that *Perez* is distinguishable because, in that case, the defense had defaulted its claim that the trial court had improperly used the term "recommend" during *voir dire*. (*Perez*, 108 Ill. 2d at 91.) However, the principles of *Perez* are applicable to the facts of this case. In this case, the trial court never used the word "recommend" during either the first or second stage of the sentencing hearing. Furthermore, the jury was instructed (both orally and in writing) that the verdict would read as follows:

> "We the Jury unanimously find that there are no mitigating factors sufficient to preclude imposition of a death sentence.
>
> The Court shall sentence the defendant, Derrick Morgan, to death • • • ."

The trial court used the term "recommend" only during *voir dire*, and not at the sentencing hearing. The trial court also made numerous statements during the *voir dire* to the effect that the members of the venire may be required to determine whether the defendant should be sentenced to death. Thus any error that the trial court may have made was cured by its subsequent actions.

The defendant next argues that he was denied the right of allocation at sentencing. This court has held that there is no right to allocution during the second stage of the sentencing hearing. (*People v. Gaines* (1981), 88 Ill. 2d 342, 374-79.) Defendant offers no reason why this court should overrule *Gaines*, and we decline to do so.

Defendant also asserts that his rights to a fair sentencing hearing were denied when the prosecution was allowed to give opening and rebuttal closing arguments at the second stage of the sentencing hearing. This procedure is proper and does not violate any of defendant's constitutional rights. *People v. Williams* (1983), 97 Ill. 2d 252, 302-03.

The defendant also contends that he was denied an impartial jury when the trial court refused to ask potential jurors if they would automatically impose the death penalty if they found the defendant guilty. During jury selection, the defendant requested that the trial court ask prospective jurors: "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?" The trial court denied this request.

This court has already held that "there is no 'reverse-*Witherspoon*' rule that requires the trial court to 'life qualify' a jury to exclude all jurors who believe that the death penalty should be imposed in every murder case." (*Brisbon*, 106 Ill. 2d at 359.) Further, the defendant has not demonstrated, or even suggested, that any of the actual jurors on his jury were biased towards the death penalty. *People v. Caballero* (1984), 102 Ill. 2d 23, 46.

Defendant contends that the questions regarding bias must include the "life qualifying" or "reverse-*Witherspoon*" question, pursuant to *Ross v. Oklahoma* (1988), 487 U.S. 81, 101 L. Ed. 2d 80, 108 S. Ct. 2273. In *Ross*, a prospective juror stated that he would automatically vote for the death penalty if the defendant were

found guilty. The trial court refused to excuse the prospective juror for cause, and the defendant used a peremptory challenge to remove the prospective juror from the panel. (*Ross*, 487 U.S. at 83-85, 101 L. Ed. 2d at 86-87, 108 S. Ct. at 2276.) The Court found that although it was error not to excuse that potential juror for cause, the death sentence need not be reversed, as there was no showing that any *juror* on the defendant's jury was *actually* shown to be impartial. *Ross*, 481 U.S. at 91, 101 L. Ed. 2d at 92, 108 S. Ct. at 2280.

In this case, the defendant's jury was selected from a fair cross-section of the community, each juror swore to uphold the law regardless of his or her personal feelings, and no juror expressed any views that would call his or her impartiality into question. Thus, as there was no showing that any actual juror on the defendant's jury was partial, the sentence is valid.

The defendant next contends that it was prejudicial error for the trial court to instruct the jury that mere sympathy should not influence its sentencing decision. The defendant argues that, because his entire case in mitigation shows that he is a sympathetic individual and the mitigating evidence was presented to engender sympathy, the instruction effectively precluded the jury from considering mitigation evidence.

The defendant has waived his right to challenge the propriety of the sympathy instruction by failing to object to the instruction at trial, or in his post-trial motion for a new trial. (*Fields*, 135 Ill. 2d at 73-74.) Moreover, the United States Supreme Court has recently considered the same issue. In *Saffle v. Parks* (1990), 494 U.S. ___, 108 L.

Ed. 2d 415, 110 S. Ct. 1257, the defendant had presented mitigating evidence for the sole purpose of eliciting sympathy from the jury, and the trial court subsequently informed the jury that it was not to be influenced by sympathy. The jury then sentenced the defendant to death. (*Saffle*, 494 U.S. at ___, 108 L. Ed. 2d at 423, 110 S. Ct. at 1259.) Because that case came to the Court on collateral *habeas corpus* review, the Court did not reach the merits of the defendant's argument, finding that he was not entitled to relief because his claim would mandate a new rule that cannot be applied retroactively. *Saffle*, 494 U.S. at ___, 108 L. Ed. 2d at 428-29, 110 S. Ct. at 1263.

In *dictum* discussing the defendant's underlying claim, the Court noted:

> "Whether a juror feels sympathy for a capital defendant is more likely to depend on that juror's own emotions than on the actual evidence regarding the crime and the defendant. It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary." (*Saffle*, 494 U.S. at ___, 108 L. Ed. 2d at 427, 110 S. Ct. at 1262.)

We adopt the Supreme Court's reasoning and conclude, as has been concluded before (see *Fields*, 135 Ill. 2d at 74), that there is no error in the continued use of the sympathy instruction.

The defendant also argues that he was denied a fair sentencing hearing when the prosecution was allowed to present evidence of crimes that he had been charged

with, even though he had not been convicted of the crimes. This court has recently addressed this issue and has held that evidence of prior criminal conduct is admissible at a sentencing hearing, even though it was not adjudicated, if it is relevant, reliable, and subject to cross-examination. (*Thomas*, 137 Ill. 2d at 547.) As the evidence in this case fit the aforementioned requirements, it was not error for it to be admitted.

CONSTITUTIONALITY OF THE DEATH PENALTY

The defendant initially argues that the Illinois death penalty statute is unconstitutional because it places the burden of persuasion on the defendant to come forward with mitigating evidence. This court has held that the statute does not unconstitutionally place a burden upon the defendant to come forward with mitigating evidence. See, *e.g.*, *People v. Whitehead* (1987), 116 Ill. 2d 425, 465.

The defendant argues that *Whitehead* conflicts with *People v. Olinger* (1986), 112 Ill. 2d 324, and *People v. Del Vecchio* (1985), 105 Ill. 2d 414. These cases are not in conflict. Rather, in both of those cases, this court simply reiterated, and held constitutional, the rule that once the State establishes the existence of statutory aggravating factors, the defendant then has the burden to come forward with evidence in mitigation sufficient to preclude a sentence of death. (*Olinger*, 112 Ill. 2d at 351; *Del Vecchio*, 105 Ill. 2d at 445-46; see also *Silagy v. Peters* (7th Cir. 1990), 905 F. 2d 986, 998 (finding that the Illinois death penalty statute does not unconstitutionally place a burden on a defendant to come forward with evidence in mitigation).

The defendant also contends that the death penalty statute is unconstitutional because it does not adequately minimize the risk of arbitrary and capricious imposition of the death penalty. He points to a number of different factors that, he argues, render the statute unconstitutional. This argument was raised and rejected in *Fields*, 135 Ill. 2d at 75. The defendant simply asks that this line of cases be reconsidered and he has not presented this court with a persuasive argument that would warrant a reversal of Fields or any other decision. Therefore, we decline to reconsider this issue.

The defendant also argues that, while various aspects of the Illinois death penalty statute have been found individually constitutional, the cumulative effect of all of the aspects is to render the statute unconstitutionally arbitrary and capricious. This court rejected this argument in *People v. Thomas* (1990), 137 Ill. 2d 500, and the defendant presents nothing new here to persuade us to reconsider. See also *Silagy v. Peters* (7th Cir. 1990), 905 F.2d 986, 990-1001 (rejecting a facial attack on the Illinois death penalty statute).

DEFENDANT'S *PRO SE* POST-TRIAL MOTION

Defendant's final contention is that the trial court erred in not appointing new counsel to investigate his post-sentencing motion for a new trial. In his *pro se* motion for a new trial, the defendant alleged that he had received ineffective assistance of counsel because his attorneys had failed to determine whether Benjamin was a paid informant. At the post-trial hearing, defendant's attorneys admitted that they did not determine whether

Benjamin was a paid informant, and they sought to withdraw from the case, and requested that the trial court appoint a new attorney to investigate the defendant's ineffectiveness claims.

There is no *per se* rule requiring a trial court to appoint new counsel every time a post-trial motion includes an allegation of ineffective assistance of counsel. (See, *e.g.*, *People v. Brandon* (1987), 157 Ill. App. 3d 835, 846.) Whether an actual conflict exists is determined by the underlying allegations of ineffectiveness, and a trial court's determination that a claim is spurious will not be overturned unless it is manifestly erroneous. *Brandon*, 157 Ill. App. 3d at 846-47.

In denying the defendant's motion, the trial judge stated:

> "I think that the job that the defense attorneys have preformed [sic] in their duties with reference to this case is not questionable, the evidence is quite direct and uncontradicted, and accordingly, I am not going to conjecture on possibilities or facts that are not matters which could be reasonably inferred from the facts involved herein.
>
> We can manufacture any type of case we want to in hindsight. In foresight the facts do not justify any such conclusion."

The trial judge also noted that there was no hint of evidence that Benjamin was a paid informant. In fact, he felt that the argument was nothing more than a "smokescreen." The defendant did not allege any new facts that would tend to show that Benjamin was paid. Accordingly,

appointment of new counsel would have been wasteful and futile. See *People v. Dudley* (1970), 46 Ill. 2d 305, 310.

A trial court's findings in this matter will not be reversed unless found to be manifestly erroneous (*Brandon*, 157 Ill. App. 3d at 847.) Since there was no evidence anywhere in the record that even tended to show that Benjamin was a paid informant, we cannot find that the trial court's failure to appoint new counsel to investigate the allegations was manifestly erroneous.

For the reasons stated, we affirm the defendant's conviction and sentence for murder, The clerk of this court is directed to enter an order setting Wednesday, May 15, 1991, as the date on which the death sentence, entered in the circuit court of Cook County, is to be carried out. Defendant shall be executed by lethal injection in the manner provided by section 119-5 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1985, ch. 38, par 119-5). The clerk of this court shall send a certified copy of the mandate in this case to the Director of Corrections, the warden at Stateville Correctional Center, and the warden of the institution in which the defendant is confined,

Judgment affirmed.

JUSTICE BILANDIC took no part in the consideration or decision of this case.

JUSTICE CLARK, dissenting:

Because the State failed to meet its burden of proof with respect to the existence of a statutory aggravating

factor, and because the prosecutor made erroneous comments during his arguments at the sentencing hearing, I would vacate defendant's death sentence.

In order to enhance a murder to a capital offense, the State must prove beyond a reasonable doubt that an aggravating factor exists. (Ill. Rev. Stat. 1987, ch. 38, par. 9-1(b).) In this case, the State attempted to prove that the murder was committed pursuant to a contract. (Ill. Rev. Stat. 1987, ch. 38, par. 9-1(b)(5).) The only evidence the State presented to meet its burden with respect to the aggravating factor is Benjamin's testimony regarding defendant's confession to him. While the confession is adequately corroborated with respect to the commission of the murder itself, there is no evidence to corroborate the State's claim that defendant was hired to commit the murder.

As the majority notes, the State produced enough evidence to corroborate certain statements contained in defendant's confession. For example, the details in defendant's confession are consistent with the name of the victim, the location of the shooting, the presence of a bag of flour, the presence of Evans and Lockridge, and the number of shots fired. These facts sufficiently corroborate defendant's confession, such that the confession, when taken as a whole, supports defendant's conviction for murder.

However, when considered individually, not every statement contained in defendant's confession to Benjamin is consistent with other evidence. In fact, at least one statement is directly contradicted by the physical evidence in the case. According to Benjamin's testimony,

defendant stated that he used a .357 pistol in the killing. Although there was no direct testimony regarding the caliber of bullets removed from the victim, testimony tends to show the bullets could not have come from a .357 pistol. The pathologist who performed the autopsy on the victim's body testified that the victim's head was intact, that there were five bullet entry wounds but no exit wounds, and that six bullets were removed from the victim's body. Two of the bullets entered the victim through the same entry wound, which indicates that the shots were fired from an extremely close range. This testimony indicates that the bullets did not come from a large caliber gun, such as a .357 pistol. It is inconceivable that the victim's head would be left intact if the victim received six shots from a .357 pistol at close range. Moreover, a gun that powerful could be expected to produce exit wounds. Therefore, the manifest weight of the evidence shows that contrary to defendant's statement in his confession, a .357 pistol was not used in the murder.

The fact that a .357 pistol was not used in this murder does not of course mandate a reversal of defendant's conviction. Rather the fact defendant lied with respect to this portion of his confession points out that he may have also lied with respect to the money he was to receive for the killing. If, as the State argues, defendant was boasting of his crimes in order to enhance his status among his fellow inmates, it is very possible that he embellished the facts to enhance the story. This is one possible explanation for the inaccurate description of the gun used. Indeed the State specifically argues that defendant "in all likelihood was boasting about the size of the gun he used." Such an explanation can be applied equally to that

portion of the confession dealing with the contract. That is, defendant may have lied about the contract in order to enhance his status among fellow inmates.

The fact defendant's confession contained lies is especially relevant because the State produced *no evidence* to corroborate the specific statement that defendant was to receive money for his role in the murder. Given the fact that at least one other statement in the confession was false, I believe the State had the burden of producing evidence to corroborate the individual statement regarding the contract. Because no such evidence was produced, I believe a reasonable doubt exists as to whether the murder was committed pursuant to a contract. Therefore, I would reverse defendant's death sentence.

As support for their finding that the State met its burden, the majority relies on evidence of the steps taken to lure the victim to a vacant apartment, the number of shots fired into the victim, and the fact an El Rukn general witnessed the killing. The majority contends these facts support a finding that the murder was committed pursuant to a contract. This reasoning is tenuous at best. This evidence supports a finding that the murder was premeditated, that defendant had accomplices who may have witnessed the murder, and that defendant took steps to avoid detection. However, it does not in any way indicate the motive for the killing, or that defendant received money for the murder.

In addition to the lack of evidence to corroborate the existence of a contract, numerous statements by the prosecutor during his closing argument at the first phase of

the sentencing hearing warrant reversal of the death sentence. The majority concludes that defendant waived objections to these errors because he did not object at trial or include the errors in a post-trial motion. Moreover, the majority concludes that the errors were not plain error because the evidence was not closely balanced. (Slip op. at 30.) Because I believe the evidence was closely balanced with respect to the existence of a contract, I would apply the plain error doctrine and review the alleged errors. *People v. Young* (1989), 128 Ill. 2d 1, 47.

The erroneous arguments arose in the sentencing hearing, which is a proceeding separate from the guilt or innocence phase of the trial. (Ill. Rev. Stat. 1987, ch. 38, par. 9-1(d).) Therefore, the only relevant question is whether the evidence was closely balanced with respect to the existence of a contract. The fact that the confession was corroborated in respects other than the existence of a contract is irrelevant to a determination of whether the evidence was closely balanced in regard to the aggravating factor.

During its opening argument at the sentencing hearing, the State argued that the jury's guilty verdict was equivalent to a finding that the murder was committed pursuant to a contract. Specifically the State argued:

> "With regard to the second propositions, second issue, whether or not the defendant committed the murder as a result of a contract agreement or an understanding whereby he was to receive money, this you have already decided in your guilty verdict. By your guilty verdict you have told the witnesses who were on the stand that, 'We believe those witnesses and we believe what they say.' So, don't go back there and try to rehash your own guilty verdict.
>
> * * *
>
> You have already decided these issues. You have already decided the fact that what William Benjamin told you was backed up, re-enforced [*sic*] corroborated by what LaShone Joyner told you, what the medical examiner told you and what the evidence from Peter Poole and the scene photo showed you. Don't go back and rehash that, ladies and gentlemen.
>
> You[r] duty is easy at this point. You have already found that the second statutory factor, that being that he was convicted of a murder pursuant to a contract agreement or understanding is in place."

Defendant argues these comments misstate the law in that a guilty verdict does not necessarily encompass a finding that the murder was committed pursuant to a contract. I agree.

Initially, I note that there are certainly instances in which a jury's verdict necessarily means that it has also found the existence of an aggravating factor. For example, it is possible for a jury to convict a defendant with armed robbery and murder arising out of the same incident. In such a case, the jury has necessarily determined that the murder occurred in the course of committing another felony (Ill. Rev. Stat. 1987, ch. 38, Par. 9-1(b)(6).) However, in this case no such conclusion may be drawn from the jury's guilty verdict. Motive is not an element of murder, and as such, the jury need not have even considered why the victim was killed. (Ill. Rev. Stat. 1987, ch. 38,

par. 9-1(a).) Therefore, the State's comments that the jury had already decided the issue is not supported by the evidence. At best, these comments could have confused the jurors, and at worst could have misled them.

Defendant contends a second error was made during the State's rebuttal argument when the prosecutor stated: "Why did the murder happen? There was no logical explanation given. Mr. Benjamin's testimony has given the facts and circumstances of the case and it was a contract." Defendant argues that this statement improperly shifted the burden of proof to defendant with respect to the aggravating factor. I agree.

There is a legal presumption that this murder was not committed pursuant to a contract. This is implicit in the fact that the State has the burden of proving beyond a reasonable doubt that an aggravating factor exists. (Ill. Rev. Stat. 1987, ch. 38, par. 9-1(f).) Therefore, defendant need not have produced any evidence on the issue. The State's comment implies that because no other "logical explanation" was presented, Benjamin's testimony must be true. Such a comment misstates the burden of proof in this case. The impact of the error is compounded by the fact defendant has maintained throughout the entire proceeding that he did not commit the murder or confess to Benjamin. Accordingly, defendant could not be expected to put on evidence that he had a different motive for the killing.

The combined effect of the State's improper comments may have misled the jury into believing that it had already decided the existence of an aggravating factor, and that defendant had the burden of disproving this

factor. Taken alone each of these comments is reversible error. Together the effect is even more apparent. Therefore, I would reverse defendant's death sentence and remand for a new sentencing hearing.

JUSTICE FREEMAN joins in this dissent.

ILLINOIS SUPREME COURT
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April 1, 1991

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No. 67692 – People State of Illinois, appellee, v. Derrick Morgan, appellant. Appeal, Circuit Court (Cook).

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

Bilandic, J., took no part.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on April 11, 1991.

Supreme Court of the United States

No. 91-5118

Derrick Morgan,

Petitioner

v.

Illinois

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Illinois.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted, and that the petition for writ of certiorari be, and the same is hereby, granted.

October 15, 1991

No. 91-5118

In The

Supreme Court of the United States

October Term, 1991

DERRICK MORGAN,

Petitioner,

vs.

ILLINOIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether the trial court's refusal to ask whether potential jurors would automatically impose a death sentence if they convicted petitioner of murder violated due process and the Sixth Amendment guarantee of an impartial jury?

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OPINIONS AND JUDGMENTS BELOW

Certiorari was granted to review the decision of the Illinois Supreme Court in *People v. Morgan*, 142 Ill.2d 410, 568 N.E.2d 755 (1991), reprinted at pages 125-185 of the Joint Appendix. The order of the Illinois Supreme Court denying rehearing is reprinted at page 186 of the Joint Appendix.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The defendant was charged with murder and armed violence. (R. 1526-1533) The armed violence charge was later dismissed by the state. (R. 173) A jury convicted the defendant of murder and the same jury sentenced him to death. (R. 1216, 1477)

The trial court, rather than the attorneys, conducted *voir dire*. The state requested the court to "*Witherspoon*" the jury. (J.A. 2) The petitioner filed a motion opposing that request. (J.A. 2-8) That motion was denied. (R. 73) Before questioning the potential jurors individually, the court asked each of the three panels of potential jurors whether they could not impose a death sentence "regardless of the facts." (J.A. 9, 78, 90) Seventeen potential jurors were excused when they expressed varying degrees of doubt about their ability to impose death. (J.A. 10-22, 79-83, 90-94)

When first asked by the Court to exercise its peremptory chailenges, the defense requested that the court ask the potential jurors this question: "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?" (J.A. 44) The court denied the request. (J.A. 44-45)

After the court questioned the panels of potential jurors, many of the potential jurors individually were asked whether they would automatically vote against the death penalty no matter what the facts were. Stuart Ship, who served as a juror, responded, "I would not vote against it." (J.A. 97-98) Petitioner was subsequently convicted of murder and sentenced to death. (J.A. 125)

On appeal, the Illinois Supreme Court affirmed the conviction and sentence. (J.A. 125-185) On this issue, that court held that there is no "reverse-*Witherspoon*" rule requiring the trial court to "life qualify" a jury. The court also rejected the claim because petitioner could not show that any of his jurors were biased towards the death penalty. (J.A. 172-173)

SUMMARY OF ARGUMENT

A jury was impaneled to try petitioner for capital murder. All potential jurors were asked whether they could not impose the death penalty under any circumstances. Those who could not were removed for cause. The trial court refused to ask potential jurors whether they would always impose death upon a convicted murderer. The jury sentenced petitioner to death.

The Illinois Supreme Court held that the trial court was not required to ask whether jurors automatically would impose death. That ruling violated petitioner's right to a fair and impartial sentencing jury, guaranteed him by the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. *Turner v. Murray*, 476 U.S. 28, 90 L.Ed.2d 27, 36, n.9, 106 S.Ct. 1683 (1986). Neither jurors who will automatically impose the death penalty nor those who will never impose death can serve on a capital sentencing jury. *Ross v. Oklahoma*, 487 U.S. 81, 101 L.Ed.2d 80, 88, 108 S.Ct. 2273 (1989); *Adams v. Texas*, 448 U.S. 38, 65 L.Ed.2d 581, 100 S.Ct. 2521 (1980).

There exist people who believe that death automatically should be imposed following a murder conviction.

The possibility that some of those people are summoned for jury duty is sufficiently real that the Sixth and Fourteenth Amendments require that inquiry be made into individuals' beliefs that the death penalty is mandatory. An impartial jury cannot be one that is uncommonly willing to condemn a man to die. *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed.2d 776, 784, 88 S.Ct. 1770 (1968). Even were there few such individuals, the complete finality of the death penalty requires inquiry into this subject. *Turner v. Murray*, 476 U.S. 23, 90 L.Ed.2d 27, 106 S.Ct. 1683 (1986).

The Illinois Supreme Court also upheld the sentence because every juror had said that he could be fair. Because a belief that death automatically should be imposed reflects upon an individual's inability to follow the law, rather than upon his fairness, promises of fairness by individuals cannot substitute for asking whether they believe death automatically should be imposed. This requirement will be no great burden upon trial courts. Jurors need not be questioned out of the hearing of other jurors, nor in any greater detail than when they are now routinely questioned about their opposition to the death penalty.

The trial court's questioning allowed the state to know which jurors never would impose death and to have them removed for cause. The defendant could not know who automatically would impose death and could not challenge them. The state's advantage resulted from a *voir dire* that was so partial to the state that it violated the due process guarantee that trial procedures confer reciprocal benefits upon the state and the defendant. *Wardius v. Oregon*, 412 U.S. 470, 37 L.Ed.2d 82, 93 S.Ct. 2208 (1973).

ARGUMENT

THE TRIAL COURT'S REFUSAL TO ASK WHETHER POTENTIAL JURORS WOULD AUTOMATICALLY IMPOSE A DEATH SENTENCE IF THEY CONVICTED PETITIONER OF MURDER VIOLATED DUE PROCESS AND THE SIXTH AMENDMENT GUARANTEE OF AN IMPARTIAL JURY.

The death penalty is a very emotional subject. As a result, jurors are likely to hold very strong views on its desirability. Most of the public favors the death penalty and many of those individuals must think that death should be imposed whenever a person is convicted of murder. Yet, the trial court refused to ask potential jurors whether, "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?" (J.A. 44)

A.

INDIVIDUALS WHO WILL AUTOMATICALLY IMPOSE A DEATH SENTENCE UPON A CONVICTED MURDERER ARE PROHIBITED FROM SITTING ON CAPITAL SENTENCING JURIES.

This Court has recognized that jurors who would automatically impose the death penalty upon a convicted murderer should not serve on a sentencing jury. *Stroud v. United States*, 251 U.S. 15, 64 L.Ed. 103, 111 (1919); *Ross v. Oklahoma*, 487 U.S. 81, 101 L.Ed.2d 80, 88, 108 S.Ct. 2273 (1988). Many other jurisdictions have reached the same conclusion.[1]

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[1] *Bracewell v. State*, 506 So.2d 354 (Ala.Cr.App. 1986); *Pickens v. State*, 292 Ark. 362, 730 S.W.2d 230 (1987); *People v.*

(Continued on following page)

Such individuals should be excluded from sentencing juries. An individual with views of the death penalty that would prevent or substantially impair the performance of his duties as a juror may not be a member of a sentencing jury. *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L.Ed.2d 841, 105 S.Ct. 844 (1985). A juror is biased if he or she cannot put aside his or her prior impression concerning an issue and reach a verdict based on the evidence presented in court. *Irvin v. Dowd*, 366 U.S. 717, 6 L.Ed.2d 751, 755, 81 S.Ct. 1639 (1961). A juror who would automatically impose death upon a convicted murderer has such a view. *Ross v. Oklahoma*, 101 L.Ed.2d at 88; *People v. Coleman*, 759 P.2d at 1270. The Illinois Supreme Court once recognized as much, albeit in *dicta*. *People v. Hobbs*, 35 Ill.2d 263, 220 N.E.2d 469, 473-474 (1966). A jury that

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(Continued from previous page)

Coleman, 46 Cal.3d 749, 759 P.2d 230 (1987); *Sims v. United States*, 405 F.2d 1381 (D.C. Cir. 1968); *Poole v. State*, 194 So.2d 903 (Fla. 1967); *Skipper v. State*, 257 Ga. 802, 364 S.E.2d 835 (1988); *Stanford v. Commonwealth*, 734 S.W.2d 781 (Ky. 1987); *State v. Henry*, 196 La. 217, 198 So. 910 (1940); *Hunt v. State*, 321 Md. 387, 583 A.2d 218 (1990); *State v. McMillen*, 783 S.W.2d 82 (Mo. banc 1990); *Thompson v. State*, 721 P.2d 1290 (Nev. 1986); *State v. Williams*, 113 N.J. 393, 550 A.2d 1172 (1988); *State v. Rogers*, 341 S.E.2d 713 (N.C. 1986); *State v. Lawrence*, 44 Ohio St. 3d 24, 541 N.E.2d 451 (Ohio 1985); *Ross v. State*, 717 P.2d 117 (Okl.Cr. 1986); *State v. Wagner*, 305 Or. 115, 752 P.2d 1136 (1988); *Commonwealth v. White*, 531 A.2d 806 (Pa. Super. 1987); *Cumbo v. State*, 670 S.W.2d 251 (Tex.Crim.App. 1988); *State v. Norton*, 675 P.2d 577 (Ut. 1983); *Patterson v. Commonwealth*, 283 S.E.2d 212 (Va. 1981); *State v. Hughes*, 106 Wash.2d 176, 721 P.2d 902 (1986); *U.S. v. Puff*, 211 F.2d 171 (2d Cir. 1954); *Crawford v. Bounds*, 395 F.2d 297 (4th Cir. 1968).

contains individuals who believe that death should automatically follow a murder conviction is not impartial, but is a jury "uncommonly willing to condemn a man to die." *See, Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed.2d 776, 784, 88 S.Ct. 1770 (1968).

B.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE SIXTH AMENDMENT GUARANTEE A CAPITAL DEFENDANT THE RIGHT TO ASK POTENTIAL JURORS WHETHER THEY WILL AUTOMATICALLY IMPOSE DEATH IF THE DEFENDANT IS CONVICTED OF MURDER.

The right to an impartial sentencing jury in a capital case is guaranteed by both the Sixth Amendment, made applicable to the states through the Fourteenth Amendment, and by principles of due process. *Turner v. Murray*, 476 U.S. 28, 90 L.Ed.2d 27, 36, n.9, 106 S.Ct. 1683 (1986). A specific subject must be covered by *voir dire* questioning if the failure to do so would render a defendant's trial fundamentally unfair. *Mu'Min v. Virginia*, 500 U.S. ___, 114 L.Ed.2d 493, 506, 111 S.Ct. ___ (1991). The question is whether absent the questioning, the jurors would not be "indifferent as [they stand] unsworne." *Ristaino v. Ross*, 424 U.S. 589, 47 L.Ed.2d 258, 264, 96 S.Ct. 1017 (1976). This Court has not held that the Constitution requires *voir dire* questioning to cover any subject other than racial bias, and racial bias must be inquired into only in certain circumstances. *Ristaino v. Ross*, 47 L.Ed.2d at 264. This Court should now require state trial courts, upon request by the defendant, to ask each venireperson whether he or she would automatically impose death upon a convicted

murderer. The defendant's and the government's interests in obtaining an impartial jury to conduct the highly subjective task of capital sentencing require as much.

The only reliable way to discovery whether a venireperson will automatically impose death is to specifically ask that question during *voir dire*. General fairness questions cannot suffice. A juror who believes that death should automatically be imposed believes that he is being fair in imposing it. Fairness questions are inadequate simply because the issue is not one of fairness, but the ability of an individual to follow the law.

Nor can a juror's promise to follow the law serve as a substitute for this inquiry. To impose death in Illinois, a jury must find only that the mitigating evidence does not preclude the death penalty. (J.A. 123) An individual who will always impose the death penalty will never find enough mitigation to preclude imposing death. State law will have been complied with, but the constitutional requirement of an impartial jury will still have been violated.

Such questioning is especially necessary given the nature of capital sentencing. In a capital sentencing proceeding, the jury is called upon to make a highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves. *Caldwell v. Mississippi*, 472 U.S. 320, 340, n.7, 86 L.Ed.2d 231, 105 S.Ct. 2633 (1985). The Eighth Amendment requires every capital sentencer to weigh relevant mitigating evidence before deciding whether to impose the death penalty. *Turner v. Murray*, 90 L.Ed.2d at 35. This Court has recognized that

the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination. *California v. Ramos*, 463 U.S. 992, 998-999, 77 L.Ed.2d 1171, 103 S.Ct. 3446 (1983). A greater degree of scrutiny should be applied to potential sentencing jurors. A juror who believes that death should automatically be imposed upon a convicted murderer cannot weigh mitigation. Excusing those individuals from jury duty will increase the reliability of jury sentencing.

This Court allows states to *Witherspoon* jurors because the state has an important interest in removing potential jurors who cannot impose death or whose opposition to the death penalty will substantially interfere with their ability to impose death. *Witherspoon v. Illinois*, 20 L.Ed.2d at 784; *Lockhart v. McCree*, 476 U.S. 162, 90 L.Ed.2d 137, 152, 106 S.Ct. 1758 (1986). The defendant's interest in a fair sentencing jury is greater than the state's because it is his life the state is seeking to forfeit. That interest is especially great where, as in Illinois, any one juror can preclude the imposition of death. Ill.Rev.Stat., 1989, Ch. 38, § 9-1(g). That is an important right granted by the state to every defendant, but one that loses meaning unless every juror is capable of precluding a death sentence. Those who would automatically impose death are not.

Seventy-six percent of United States citizens favor the death penalty. Of those who support the death penalty, one-half supported it because they believed in the concept of "a life for a life." *The Gallup Poll Monthly*, June, 1991, 40-45. Given the oft repeated Biblical injunction of an eye for an eye, it is unsurprising that a significant

number of those who favor the death penalty believe that death should automatically be imposed upon every individual convicted of murder.[2] There are so many court decisions dealing with such individuals that they must constitute a significant portion of potential jurors. Such individuals appear even in cases where their fitness to serve is not an issue. One such person was excused for cause in *Mu'Min v. Virginia*, 114 L.Ed.2d at 503. Three were excused in *Pope v. United States*, 372 F.2d 710, 724-725 (8th Cir. 1967). One such juror may have been on petitioner's jury. Stuart Ship, when asked in *voir dire* if he would automatically vote against the death penalty, replied, "I would not vote against it." (J.A. 97-98)

When this Court required inquiry into racial prejudice in *Aldridge v. United States*, 283 U.S. 308, 75 L.Ed. 1054, 51 S.Ct. 470 (1931), it did so relying heavily on a unanimous body of state court precedents holding that such inquiry should be made. *Mu'Min v. Virginia*, 114 L.Ed.2d at 506. Of jurisdictions that have considered whether jurors should be asked whether they would always impose death, almost all have answered affirmatively, and no cases have held that such jurors should sit on a capital sentencing jury. Many decisions have held that they should not.

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[2] A survey of jurors in Kentucky revealed that 24.1% would be excludable because they would always vote to impose the death penalty for every case in which they were sure beyond a reasonable doubt that the defendant was guilty of capital murder.

Neises, M. L. & Dillehay, R.C. (1987). Death Qualification and Conviction Proneness: *Witt* and *Witherspoon* Compared. *Behavioral Sciences & The Law*, Vol. 5, 479-494, 485.

Only two states other than Illinois which have considered the question have held that inquiry into whether a juror would automatically impose death is not necessary. *Riley v. State*, 585 A.2d 719 (Del. 1990); *State v. Hyman*, 281 S.E.2d 209 (S.C. 1981). Even in South Carolina defendants are allowed to ask jurors whether they would automatically impose death. *Gaskins v. McKellar*, 916 F.2d 941, 949 (4th Cir. 1990); *State v. Atkins*, 399 S.E.2d 760, 765 (S.C. 1990). Many jurisdictions have explicitly held that defendants eligible for the death penalty have a right to ask potential jurors whether they would automatically impose death. *Bracewell v. State*, 506 So.2d 354 (Ala.Cr.App. 1986); *Sims v. United States*, 405 F.2d 1381 (D.C. Cir. 1968); *Poole v. State*, 194 So.2d 903 (Fla. 1967); *Skipper v. State*, 257 Ga. 802, 364 S.E.2d 835 (1988); *Stanford v. Commonwealth*, 734 S.W.2d 781 (Ky. 1987); *State v. Henry*, 196 La. 217, 198 So. 910 (1940); *State v. McMillen*, 783 S.W.2d 82 (Mo. banc 1990); *State v. Williams*, 113 N.J. 393, 550 A.2d 1172 (1988); *Commonwealth v. White*, 531 A.2d 806 (Pa. Super. 1987); *State v. Norton*, 675 P.2d 577 (Ut. 1983); *Patterson v. Commonwealth*, 283 S.E.2d 212 (Va. 1981). Some states allow the defense to ask jurors even in non-capital cases whether they could impose the full range of sentences. *Sanders v. State*, 626 S.W.2d 366 (Ark. 1982); *Martin v. State*, 780 S.W.2d 497 (Tex. App. – Corpus Christi 1989); *State v. McFarland*, 332 S.E.2d 217 (W.Va. 1985). That consensus indicates that potential jurors should be asked whether they automatically would impose death.

This Court recently rejected the contention that the Sixth Amendment required inquiry into the specifics of a potential juror's knowledge of pre-trial publicity. *Mu'Min*

v. Virginia, 114 L.Ed.2d 493. The various concerns which led to the rejection of Mu'Min's claim are not present here.

Mu'Min wanted more than what this Court had required in racial bias cases. He wanted the subject of pre-trial publicity to not only be covered in *voir dire,* but wanted this Court to require precise inquiries into that subject. *Mu'Min v. Virginia,* 114 L.Ed.2d at 505, 509-510. Here, petitioner merely wants the subject of the automatic imposition of the death penalty to be covered. More detailed inquiry would be necessary only when a potential juror indicated that he or she would automatically impose death. Jurors would not have to be questioned individually because there is no risk of contaminating impartial jurors with prejudicial information. Unlike the procedure sought by Mu'Min, there will be no perceptible impact on *voir dire* practices.

There is no substitute for this inquiry. In *Mu'Min,* the state trial judge was well aware of the extent of the publicity. His knowledge allowed him to accurately assess the truthfulness of the jurors' answers to his general questions about the effect the publicity might have upon their impartiality. *Mu'Min v. Virginia,* 114 L.Ed.2d at 510-511 (O'Connor, J., concurring). Here, Judge Cieslik had no personal knowledge of the potential jurors' views on the propriety of the death penalty. There was no informed exercise of judicial discretion involved in his decisions on impartiality, and those decisions do not require the deference granted to the trial court in *Mu'Min. Mu'Min v. Virginia,* 114 L.Ed.2d at 507.

Finally, in *Mu'Min* the *voir dire* concerning publicity "was by no means perfunctory." *Mu'Min v. Virginia,* 114 L.Ed.2d at 509. Here, the inquiry into automatic imposition of the death penalty was non-existent. Requiring trial courts to make this inquiry is the only way to ensure fair sentencing juries. In Illinois, the trial court has complete control over *voir dire. People v. Gacy,* 103 Ill.2d 1, 468 N.E.2d 1171 (1984). By refusing to ask this question, the trial court precluded inquiry into this subject.

The service of one juror who would automatically impose death results in a jury that is biased and violates the Sixth and Fourteenth Amendments' guarantee of an impartial jury. An Illinois defendant cannot now discover whether a venireperson would automatically impose death unless the venireperson volunteers that information. That is a capricious substitute for direct inquiry. To guarantee a meaningful Constitutional right to an impartial jury, this Court should make explicit what has previously been implied and hold that due process and the Sixth Amendment require, at the defendant's request, inquiry into whether a juror would automatically impose death.

C.

PETITIONER WAS DENIED DUE PROCESS BY A FUNDAMENTALLY UNFAIR *VOIR DIRE* PROCEDURE IN WHICH THE TRIAL COURT AT THE STATE'S BEHEST ASKED POTENTIAL JURORS WHETHER THEY COULD NOT IMPOSE THE DEATH PENALTY AND EXCUSED FOR CAUSE THOSE WHO COULD NOT, BUT REFUSED TO ASK POTENTIAL JURORS WHETHER THEY WOULD AUTOMATICALLY IMPOSE DEATH IF THEY CONVICTED THE PETITIONER OF MURDER.

The Due Process Clause entitles a criminal defendant to more than an impartial jury. It also speaks "to the balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 U.S. 470, 37 L.Ed.2d 82, 93 S.Ct. 2208 (1973). "This Court has therefore been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial." *Wardius v. Oregon*, 37 L.Ed.2d at 87, n. 6.

Because the trial court asked veniremembers whether they could not impose a death sentence, but refused to ask whether they always would, the *voir dire* questioning gave the state an unfair advantage in selecting the jury. The balance required by the Due Process Clause was absent in this case. Because the procedure may have resulted in the seating of jurors who could not follow the Constitution's mandate to consider mitigating evidence, the lack of reciprocity interfered with petitioner's right to be sentenced fairly.

That imbalance is entrenched in Illinois. The ruling in *Witherspoon* should have benefited criminal defendants

because it was a limitation on the state's ability to excuse jurors. *Wainwright v. Witt*, 83 L.Ed.2d at 851. But *Witherspoon* routinely has been construed by Illinois courts as conferring a special right upon the state. The peculiar view of *Witherspoon* extant in Illinois is exemplified by the Illinois Supreme Court's decision in *Daley v. Hett*, 113 Ill.2d 75, 495 N.E.2d 513 (1986).

There, several defendants chose to waive their right to a sentencing jury before trial. The trial courts accepted those waivers, leaving the jury to determine only guilt while any sentence would be decided by the court. The trial courts ruled that the state could not *Witherspoon* the jurors. The Cook County State's Attorney filed various writs in the Illinois Supreme Court seeking to compel the trial courts to death qualify the potential jurors. *Daley v. Hett*, 495 N.E.2d at 514-515.

The Illinois Supreme Court upheld the right to waive a sentencing jury prior to the start of trial. *Daley v. Hett*, 495 N.E.2d at 516. The court then considered the second issue, whether the trial courts were nonetheless required to *Witherspoon* the potential jurors. The court held:

> However, plaintiff's right under *Witherspoon* does not come into effect where, as here, the juries that consider the issue of guilt will not consider eligibility for the death penalty. Because we have determined that trial judges have the statutory authority to accept pretrial waivers of sentencing juries, plaintiff's right under *Witherspoon* is inapplicable to the instant cases.
>
> *Daley v. Hett*, 495 N.E.2d at 516-517.

The Illinois Supreme Court believes *Witherspoon* conferred a right upon the state. The decisions in *Daley v. Hett* and this case have created a rule where the state is entitled to *Witherspoon* a sentencing jury but the defense has no corresponding right to ask the reciprocal question. This procedure has "unfairly weighted the scales in a capital trial. . . . " *Payne v. Tennessee*, 501 U.S. ___, 115 L.Ed.2d 720, 733, 111 S.Ct. ___ (1991).

Whatever views Illinois courts may hold, the *voir dire* in this case was unfair, and relief has been granted under similar circumstances. In one case, a juror said that he felt it would be his duty to sentence to death a defendant found guilty of murder. No further questions were asked, and the juror was seated. *Crawford v. Bounds*, 395 F.2d at 301-302, 303-304. Another venireman, who believed the defendant to be guilty, was rehabilitated by the trial court and seated. In contrast, any venireman with scruples against the death penalty was excused without further interrogation. *Crawford v. Bounds*, 395 F.2d at 303. The court held that:

> To permit a juror whose mind is foreclosed on one side of that issue to serve, while eliminating those who think to the contrary, and to exert special effort to qualify one whose mind may be foreclosed on the issue of guilt while freely excusing those who indicate a predisposition as to punishment, were not the ways to achieve the constitutional objective. Denial of equal treatment in the manner of selection inevitably resulted in a denial of due process.
>
> *Crawford v. Bounds*, 395 F.2d at 304.

In another case, a due process challenge to the jury selection was rejected. *Pope v. United States*, 372 F.2d 710 (8th Cir. 1967). In that case, in addition to questioning jurors about their scruples against the death penalty, the court inquired whether jurors believed in "an eye for an eye and a tooth for a tooth" and whether "those who live by the sword shall perish by the sword." *Pope v. United States*, 372 F.2d at 727. As a result, ten jurors were excused for scruples against the death penalty, and three because they believed that they would automatically impose death. *Pope v. United States*, 372 F.2d at 724-725. That reciprocity was lacking in petitioner's case.

If the Sixth and Fourteenth Amendments do not require that a defendant be allowed in every case to ask potential jurors whether they will always impose death, principles of due process require such inquiry in those cases where potential jurors are questioned about their scruples against the death penalty. Any other ruling guarantees the state a nonreciprocal benefit in jury selection.

D.

PETITIONER'S DEATH SENTENCE MUST BE VACATED.

Any individual who would automatically impose a death sentence upon petitioner was not qualified to serve on his jury. The *voir dire* in this case could not reveal whether any jurors would impose a death sentence automatically. Because the inadequacy of the *voir dire* may have permitted such individuals to serve on petitioner's jury, his death sentence must be vacated.

CONCLUSION

Wherefore, petitioner prays that the judgment of the Illinois Supreme Court be reversed and the cause be remanded with directions that petitioner receive a new sentencing hearing.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DERRICK MORGAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of Illinois

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Do the Fourteenth and Sixth Amendment rights to a fair and impartial jury require voir dire questioning concerning potential bias in favor of the death penalty in every state court prosecution for a capital offense.

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BRIEF FOR RESPONDENT

OPINION BELOW

Certiorari was granted to review the decision of the Illinois Supreme Court in *People v. Morgan*, 142 Ill. 2d 410, 568 N.E.2d 755 (Ill. 1991). A copy of that opinion may be found within the parties' joint appendix at pages 125-185.

STATEMENT OF THE CASE

Petitioner, Derrick Morgan, was indicted along with two others (Lockridge and Evans) by the Cook County Grand Jury for murder: the shooting death of David "Swift"

Smith. The Petitioner was found guilty of the charge by a jury (Tr. 1217), and a jury found him eligible for the death penalty (Ill. Rev. Stat. ch. 38, §9-1(b)(5)), and then sentenced Petitioner to death. (Tr. 1477) Judgment was entered on the verdict. (Tr. 1736)

Briefly, the evidence showed Petitioner admitted to having been paid by a "big dope dealer" $2,000 before, and $2,000 after, he and two other El Rukns (gang members) murdered a man called "Swift." Petitioner admitted to a witness (Stephen Benjamin) that he placed a bag of flour in an abandoned apartment on Calumet Avenue, and then lured "Swift" to that apartment, telling "Swift" that he had cocaine for them to pick up. (Tr. 717)

Once there, with Lockridge and Evans nearby, Petitioner allowed "Swift" to taste the flour, and as "Swift" was tasting it, shot him in the head five or six times. (Tr. 718)

Benjamin also testified that Petitioner told him he was planning to break out of the LaPorte County (Indiana) jail on a trip to the dentist's office, by killing the guards and then go back to Chicago and "take care of all of the witnesses." (Tr. 719)

On December 17, 1985, police officers found David "Swift" Smith lying in a pool of blood, a clear plastic bag containing a white powder near his body. Police officers noticed several gunshot wounds to "Swift's" head. Lashone Joyner, the live-in girlfriend of David "Swift" Smith, described "Swift" as being "good friends" with the Petitioner. (Tr. 663) Both Petitioner and the victim appear to be of the same race. (Tr. 301)

The jury was selected on July 6 and July 7, 1988. (Tr. 183, 432) Three separate venires were brought to the courtroom before the jury was chosen. The trial judge advised each venire that, if chosen as jurors, each juror

"must follow" the law. (J.A. 23, Tr. 207, 448, 522-23) The first of such instructions was:

> [TRIAL JUDGE]: . . . After you have heard the evidence in court and testimony of the witnesses, then I will present to you propositions of law that you must follow in reaching your verdict in this case.
>
> Now, the fact the defendant was indicted is only a means by which he is brought to trial. Under the law the defendant is presumed to be innocent of the charge against him, and this remains throughout the trial of the case and is only overcome after you have heard all the evidence, and closing arguments of the counsel, and been advised on the law by the Court, and you have been retired to the jury room, and after you have all unamiously [sic] agreed, then your decision will make a determination.
>
> The Judge is the judge of the law, which means I will decide what law is to be presented in this case. . . . (J.A. 23)[1]

The trial judge also advised each venire that, if chosen as jurors, each venire person would first deliberate on guilt or innocence, and if a guilty finding, then on eligibility for the death penalty, and finally on the death penalty. (J.A. 23, Tr. 207, 437, 523) The trial judge emphasized

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[1] The trial judge then told the second venire: ". . . [A]fter you have heard all of the evidence and the witnesses, and you have heard the Court admonishing you with reference to the law that you must use in reaching your verdict, these instructions on the law will be instructed to you as jurors to be taken into the jury room, when you have an absolute duty and obligation to follow the instructions that the Court gives you." (Tr. 448)

The trial judge told the third venire: ". . . I would like to go into some of the basic principles of law that will be involved in this case, . . . that will be given to the jury ultimately when the case has been completed. . . . they will be given to the jury and must be used in their deliberation in reaching a verdict in this case." (Tr. 522, 523)

that further "final instructions are given after a completion of the proceedings." (J.A. 23, Tr. 522-23)

The jurors who decided the case were: Alfred Kleoss (J.A. 29), Mary Morrow (J.A. 35), Helen Zeber (J.A. 39), Ethelinda Thomas (J.A. 45), Rosanne Wurster (J.A. 50), Betty Ritchie (J.A. 57), Yolanda Farinella (J.A. 61), Robert Hinchley (J.A. 66), Wanda Davis (J.A. 73), Mark Armgardt (J.A. 83), Stuart Ship (J.A. 94), and Ronald Zubkoff (J.A. 102).

Nine of the twelve were directly asked, "Would you follow my instructions on the law, even though you may not agree with them?" (J.A. 30, 38, 43, 49, 56, 60, 64, 69, 107) All nine agreed that they would. Juror Mark Armgardt (J.A. 83) said he could be "fair and impartial," and that his answers would be "substantially the same" as other jurors. (J.A. 84, 88) Juror Wanda Davis (J.A. 73) was not asked about following the law though the question was repeated by the trial judge throughout the day. (Tr. 222, 235-36, 256, 269-70, 271, 282, 292, 294, 313, 318, 333, 343, 347, 363, 369, 374, 385, 391, 396, 399, 417) Juror Stuart Ship (J.A. 94) was also not asked about following the law. However, he was questioned almost immediately after the trial judge informed the third venire panel that they must use the instructions on the law in their deliberations. (Tr. 522-23)

After seven venire members had been questioned, including three who eventually became jurors—Kleoss (J.A. 29); Morrow (J.A. 35); Zeber (J.A. 39)—Petitioner's counsel first requested the trial judge to ask prospective jurors: "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?" (J.A. 44) Petitioner did not raise the issue earlier, even though there were two opportunities for Petitioner's counsel to suggest questions for use on voir dire. (Tr. 190, 219-27)

The trial judge's voir dire process uncovered several venire members with bias (Tr. 423, 350, 377, 382—bias against handguns); (Tr. 339—bias against "lawlessness"); (Tr. 359—persons who could "not give the defendant a fair trial.") Venire member Benjamin Dexter was asked if he could give the defendant a fair trial. He answered:

> I would have no problem during the trial. If it came . . . I had a friend's parents murdered twelve years ago before capital punishment. I would give a fair trial. If he is found guilty, I would want him hung. [sic]

Mr. Dexter was excused for cause. (J.A. 72-73)

When venire member Stuart Ship was asked if he would automatically vote against the death penalty no matter what the facts of the case were, he answered: "I would not vote against it." (J.A. 97-98) Although Petitioner's counsel challenged Mr. Ship for cause, the basis for the challenge was not that Mr. Ship was automatically for the death penalty. Rather, counsel challenged Mr. Ship because Mr. Ship initially stated that, if Petitioner did *not* testify, Mr. Ship would wonder "why." (J.A. 98, 100-101) The trial court judge denied Petitioner's challenge for cause. (J.A. 101) Since the trial judge and Petitioner's counsel believed that Petitioner had exhausted his peremptory challenges, Mr. Ship was seated as a juror. (J.A. 102, Tr. 430, 505-506)[2]

After the jury found Petitioner guilty of murder, and just before hearing the evidence of eligibility, the trial judge again advised the jurors that their task was to

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[2] Petitioner may have only exhausted nine peremptory challenges. (Lynch: Tr. 258; Wells, Disabato, Petersen: Tr. 310; Grzesiak, Mekhitarian: Tr. 330; Jambor, Bamberg: Tr. 428; Farina: Tr. 505) Thus, Petitioner actually may have had one more peremptory challenge available.

determine whether Petitioner was eligible for the death penalty. (Tr. 1216, 1238, 1658) At the conclusion of the eligibility evidence, the trial judge instructed the jurors that they could only find Petitioner death eligible if they found unanimously and beyond a reasonable doubt the existence of a statutory aggravating factor. (J.A. 112) At the conclusion of the evidence in aggravation and mitigation, the trial judge instructed the jurors that, while deliberating on the sentence, they should consider all the aggravating and mitigating factors supported by the evidence. (J.A. 122)

The jury sentenced Petitioner to death. (Tr. 1477, 1682)

The Illinois Supreme Court affirmed the conviction and the death penalty. About the issue before this Court, the Illinois Supreme Court said:

> The defendant also contends that he was denied an impartial jury when the trial court refused to ask potential jurors if they would automatically impose the death penalty if they found the defendant guilty. During jury selection, the defendant requested that the trial court ask prospective jurors: "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?" The trial court denied this request.
>
> This Court has already held that "there is no 'reverse-*Witherspoon*' rule that requires the trial court to 'life qualify' a jury to exclude all jurors who believe that the death penalty should be imposed in every murder case." (*Brisbon*, 106 Ill. 2d at 359). Further, the defendant has not demonstrated, or even suggested, that any of the actual jurors on his jury were biased towards the death penalty. *People v. Caballero* (1984), 102 Ill. 2d 23, 46.
>
> * * *

(J.A. 172-73). Petitioner now asks this Court to rule that the trial judge committed constitutional error when he

refused to ask whether prospective jurors would automatically vote to impose the death penalty no matter what the facts of the case were.

SUMMARY OF ARGUMENT

Although the Fourteenth and Sixth Amendments to the United States Constitution provide rights to a fair and impartial jury, criminal defendants in state court prosecutions do not have a constitutional right in every case to interrogate potential jurors about a bias in favor of the death penalty. General fairness questions, questions concerning the venireman's ability to find the facts and to follow the law, *Witherspoon* questioning, and the juror's oath will usually be sufficient to detect bias. If a particular juror's responses to those questions suggest an area of actual bias, or if there is a substantial indication of the likelihood of prejudice in the individual case, then additional questioning or even a challenge for cause may be appropriate. However, the Constitution does not impose a code of trial procedure on the state courts. This Court should reaffirm the right of the sovereign states and their trial judges to devise their own voir dire procedures and to control voir dire proceedings in state courtrooms.

Petitioner has not identified any special circumstance to justify a new rule of law in his case. Petitioner's case does not involve an interracial murder. Nor should this Court indulge Petitioner's belief that there is a significant number of persons automatically for the death penalty. Petitioner's studies were not introduced in the trial court, and are not properly part of the record before this Court. These studies are not matters of "general knowledge" and should be stricken.

This Court should conclude that after *Gregg v. Georgia*, 428 U.S. 153 (1976), the discretion of the capital sentencer has been confined to constitutionally acceptable limits, and now there is little opportunity for the sentencer to give vent to personal prejudices in a capital case.

Because this Court's decision in *Witherspoon v. Illinois*, 391 U.S. 510 (1968) did not confer a "benefit" on the State, Petitioner is not entitled on equitable grounds to a "reverse-*Witherspoon*" procedure. The *Witherspoon* decision only implemented the constitutional rights to a fair and impartial jury, and Petitioner has received the full measure of every right afforded him by the Constitution.

ARGUMENT

I.

THE SIXTH AND FOURTEENTH AMENDMENTS SHOULD NOT INCLUDE A SPECIFIC REQUIREMENT THAT STATE COURT JUDGES QUESTION JURORS ON WHETHER THEY WOULD ALWAYS RETURN A DEATH PENALTY VERDICT UPON FINDING A DEFENDANT GUILTY OF MURDER.

The Fourteenth Amendment's guarantee of due process of law, and the Sixth Amendment's guarantee of a fair and impartial jury, should not be interpreted as including a specific obligation on the part of the state trial judges to question prospective jurors on whether they would automatically vote for the death penalty upon finding a defendant guilty of murder.

Relying on *Witherspoon v. Illinois*, 391 U.S. 510 (1968), Petitioner urges this Court to require specific voir dire questions, directed at each prospective juror in state death

penalty proceedings, to determine whether the juror automatically would vote to impose the death penalty upon a finding of guilt. Respondent argues that the subject of voir dire is best left within the discretion of the trial judge, and that specific voir dire responsibilities are not, and should not be, required by the Constitution. Such a requirement would be an awkward intrusion into the role of state trial judges.

Obviously, no biased person should ever sit upon a jury, and any sign of bias should be followed by questions from the trial judge to detect and remove any juror who is prejudiced or who could not follow the law. *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988). But that is not our situation here. Rather, Petitioner asks this Court to constitutionally mandate the automatically for the death penalty question for every prospective juror regardless of the circumstances of the case or the personal circumstances of the prospective juror.

This Court has been reluctant to engraft a particular voir dire formula on the Sixth and Fourteenth Amendments. *Rosales-Lopez v. United States*, 451 U.S. 182 (1981) (plurality opinion); *Ristaino v. Ross*, 424 U.S. 589 (1976); *Ham v. South Carolina*, 410 U.S. 524 (1973). In *Turner v. Murray*, 476 U.S. 28 (1986) and *Mu'Min v. Virginia*, 111 S. Ct. 1899 (1991), this Court did not consider death penalty litigation to be a sufficiently compelling circumstance to justify imposing a code of voir dire procedure on the states. The Fourteenth Amendment requires due process of law in state court jury selection procedures. *Ham*, 409 U.S. at 526. To be constitutionally compelled, however, it is not enough that specific voir dire questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair. *Mu'Min*, 111 S. Ct. at 1905.

A. The danger of persons automatically for the death penalty remaining undetected throughout voir dire is not sufficiently real to require the automatically for the death penalty question as a matter of constitutional law.

This Court's voir dire cases state that specific inquiry upon a subject must be made, as part of the Sixth and Fourteenth Amendment guarantees, only if there is a "sufficiently real" presence of an attitude or feeling which would keep the prospective juror from being fair. As stated in *Mu'Min*:

> [T]wo parallel themes emerge from both sets of cases:[3] first, the possibility of racial prejudice against a black defendant charged with a violent crime against a white person is *sufficiently real* that the Fourteenth Amendment requires that inquiry be made into racial prejudice; second, the trial court retains great latitude in deciding what questions should be asked on voir dire.

111 S. Ct. at 1904 [emphasis added].

The only "sufficiently real" possibility of juror bias recognized by this Court is racial prejudice in the context of an interracial capital case. In *Turner*, 476 U.S. at 37, this Court held that a question concerning racial prejudice would be constitutionally required only when there was the conjunction of three factors: the crime charged involved interracial violence, broad discretion was given the jury at the death penalty hearing, and the special seriousness of the risk of improper sentencing in a capital case.

[3] The Court was comparing its supervisory authority over voir dire in cases tried in federal courts, *Connors v. United States*, 158 U.S. 408 (1895), *Aldridge v. United States*, 283 U.S. 308 (1931), and *Rosales-Lopez v. United States*, 451 U.S. 182 (1981), with its authority over voir dire in cases tried in state courts where the Court's authority is limited to enforcing the Constitution. *Ham v. South Carolina*, 409 U.S. 524 (1973); *Ristaino v. Ross*, 424 U.S. 589 (1976); *Turner v. Murray*, 476 U.S. 28 (1986).

Cf. Aldridge v. United States, 283 U.S. 308 (1931) (where, in the exercise of its supervisory authority over federal prosecutions, this Court also approved voir dire concerning racial prejudice for an African American defendant accused of an interracial, capital murder); *Ristaino*, 424 U.S. at 597 (construing *Ham* where petitioner Ham should have been allowed to ask questions concerning prejudice because "[r]acial issues . . . were inextricably bound up with the conduct of the trial").

Petitioner asserts that there is a sufficiently real danger that a juror automatically for the death penalty will remain undetected throughout voir dire and will be put on a jury. Petitioner persists in his position even though a venire member, Benjamin Dexter, who said that he would want to see a guilty defendant[4] "hung," [sic] was detected with a general fairness question, (J.A. 72) and excused from jury service. There was also a venire member automatically for the death penalty in *Mu'Min* who was screened out by a general fairness question. 111 S.Ct. at 1903. Petitioner erroneously insists that Stuart Ship, one of the jurors in this case, was automatically for the death penalty. When asked if he automatically would vote against the death penalty no matter what the facts of the case, Mr. Ship answered: "I would not vote against it." (J.A. 98) Although Petitioner now insists that Mr. Ship's response is clear evidence that he was automatically for the death penalty, Petitioner's objection to Mr. Ship at trial was based exclusively on Mr. Ship's statement that he would consider Petitioner's failure to testify. (J.A. 101)

[4] Dexter's words are ambiguous. Dexter may have been saying that he would want to see the person who murdered a friend's parents hanged. (J.A. 72)

B. Petitioner's studies are not part of the record, and should be stricken. Even if permitted, such studies are seriously flawed.

Petitioner and Amicus National Association of Criminal Defense Lawyers [hereinafter "NACDL"] now seek to employ four studies[5] which were not before the trial court, not considered by the Illinois Supreme Court, and are not properly part of the record before this Court. These studies should not be considered. *Ciucci v. Illinois*, 356 U.S. 571, 572-73 (1958). Respondent was unable to investigate the studies, cross-examine the authors, or bring forth other contrary studies in rebuttal. To consider these studies would be unfair to Respondent. These studies are not matters of "general knowledge", *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), and should be stricken from the record.

Even if the studies are considered, the studies are seriously flawed, and have no persuasiveness. None of the

[5] Michael Nietzel, Ronald Dillehay, and Melissa Himelein, *Effects of Voir Dire Variations in Capital Trials: A Replication and Extension*, 5 BEHAV. SCIENCE AND THE LAW 467, 473 (1987) [hereinafter "Nietzel"] (25.8% of those jurors studied were categorized as automatically for the death penalty jurors).

Michael Neises and Ronald Dillehay, *Death Qualification and Conviction Proneness: Witt and Witherspoon Compared*, 5 BEHAV. SCIENCE AND THE LAW 479, 485 (1987) [hereinafter "Neises"] (24.1% of registered voters interviewed were automatically for the death penalty jurors).

Marla Sandys and Ronald Dillehay, *Juror Qualification Under The New Wainwright v. Witt Standard: A Test of Jurors' Ability to Anticipate Their Role* p. 7 (April, 1987) (unpublished manuscript reproduced in the Exhibits of Amicus NACDL) [hereinafter "Sandys"] (28.6% of those surveyed were automatically for the death penalty jurors).

James Luginbuhl and Kathi Middendorf, *Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials*, 12 LAW AND HUM. BEHAVIOR 263, 274, 276 (1988) [hereinafter "Luginbuhl"] (1% of those surveyed were automatically for the death penalty jurors).

studies directly addresses the primary issue of this case. Three of the studies do not appear to be objective given the bias and possible conflict of interest by their common author.[6] There are serious problems in the methodology of these studies, and the results are markedly inconsistent with other studies.[7]

[6] The Neitzel, Neises and Sandys Studies do not appear to be objective when the orientation of the authors is examined. Professor Ronald C. Dillehay, who was a co-author of all three studies, has actively worked as a jury consultant for the defense in capital cases. Nietzel, *supra* note 5 at 471 n.5. Dillehay's colleague, Professor Michael Nietzel, also works in the same capacity as a defense jury consultant. The Nietzel Study, with its focus on the efficacy of using jury consultants to reduce the likelihood of a death verdict, as well as its emphasis on a jury consultant's ability to maximize successful defense challenges for cause, illustrates the bias and potential conflict of interest on the part of the authors. Nietzel, *supra* note 5 at 476.

[7] Joseph Kadane, *Juries Hearing Death Penalty Cases: Statistical Analysis of a Legal Procedure*, 78 J. AM. STAT. ASS'N 544, 549 (1983) [hereinafter "1983 Kadane"], citing Louis Harris, Study No. 814002 (January, 1981) (unpublished study for the NAACP Legal Defense and Education Fund, Inc.) [hereinafter "Harris Study"] (1% of those surveyed were automatically for the death penalty jurors).

Joseph Kadane, *After Hovey: A Note on Taking Account of the Automatic Death Penalty Jurors*, 8 L. & HUM. BEH. 115, 116 (1984) [hereinafter "1984 Kadane"] (1% of adult American population were automatically for the death penalty jurors).

Hovey v. Superior Court, 616 P.2d 1301, 1344 n.111 (Cal. 1980) (in the opinion of seven expert witnesses who testified at a hearing in the trial court, the percentage of automatically for the death penalty jurors in the population was very low).

Grigsby v. Mabry, 569 F. Supp. 1273, 1297 (E.D. Ark. 1983), *aff'd*, 758 F.2d 226, 234-35 (8th Cir. 1985), *rev'd sub nom. Lockhart v. McCree*, 476 U.S. 162 (1986), citing George Jurow, *New Data on the Effect of a "Death-Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971) (2% of those surveyed were automatically for the death penalty jurors).

Grigsby, 758 F.2d at 234-35, citing Andrea Young, Arkansas Archival Study (1981) (unpublished study) (study of 41 transcripts of voir dire in Arkansas capital cases between 1973 and 1981) (.5% were automatically for the death penalty jurors).

Two recent cases display the type of evidentiary hearings which should have been held, if these studies were introduced in the trial court. In the proceedings reviewed in *Lockhart v. McCree*, 476 U.S. 162 (1986), and *McCleskey v. Kemp*, 481 U.S. 279 (1987), experts testified in contested evidentiary hearings about empirical studies. These studies were given close judicial scrutiny.[8]

Here, by way of contrast, one of Petitioner's studies (the Sandys Study) was not even published. This Court has refused to rely on unpublished studies. *Witherspoon v. Illinois*, 391 U.S. at 517.

Petitioner's cited studies lend little validity to Petitioner's argument because none of the studies was designed to directly measure responses to the central issue in this case: how many, if any, would automatically vote for the death penalty upon conviction in contravention of their oath and the law. There is no evidence that potential jurors—no matter what their inclination or leaning—would not obey their oaths and follow the law once in a courtroom, before a judge, faced with the serious responsibilities at hand.

The Luginbuhl and Neises Studies briefly discuss persons automatically for the death penalty, but do not focus on that issue. Luginbuhl, *supra* at 274-75, Neises, *supra*

[8] Another example is *Hovey v. Superior Court*, 616 P.2d 1301 (Cal. 1980) where the trial court conducted an extensive evidentiary hearing on the issue of whether "death qualifying" questioning during *voir dire* produces a conviction prone jury. The hearing lasted 17 days and produced a 1,200 page transcript. *Id.* at 1302. Seven expert witnesses testified, five for the defense and two for the prosecution. *Id.* In excess of 1,000 pages of exhibits—primarily sociological studies and graphs and charts—were admitted into evidence, as were several videotapes. *Id.* Unlike the *Lockhart*, *McCleskey* and *Hovey* cases, the record here is completely barren of any adversarial testing of the validity of the studies relied on by Petitioner and Amicus.

at 492-93. The focus of the cited studies is clearly different: the Nietzel Study focused on the effects of different types of voir dire (individualized, sequestered vs. open court, en masse) on the success of defense challenges for cause and on the percentage of death verdicts; the Neises Study involved the question of whether the *Wainwright v. Witt*, 469 U.S. 412 (1985) standard would exclude more jurors based on their views of the death penalty than the *Witherspoon* standard and thereby make such "death qualified" juries even more conviction prone; the Sandys Study examines the *Witt* standard and its reliability for classifying jurors based on their views on the death penalty; and the Luginbuhl Study explored the relationship between attitudes toward the death penalty and support for or rejection of aggravating and mitigating circumstances in a capital trial. Thus, since none of the cited studies dealt with the central issue of this case, these studies are at best only "marginally relevant" to the constitutionality of Petitioner's conviction. *McCree*, 476 U.S. at 169.

The methodology of these studies is flawed. This Court in *McCree* questioned the value of studies *not* involving jurors who were *under oath* in a capital case and who actually deliberated. This Court stated, "We have serious doubts about the value of these studies in predicting the behavior of actual jurors." *McCree*, 476 U.S. at 171. One commentator called this concept "felt responsibility."

> The term "felt responsibility" is aptly used to describe the state of mind of actual jurors whose decisions carry real consequences. Mock jurors may or may not share this feeling of responsibility. "Felt responsibility" is particularly important in a capital case where the consequences may be life imprisonment or death. Unfortunately, no matter how realistic are the experimental conditions—and there was an effort in this study to intensely involve the subjects—no experiment can completely simulate a real life situation.

George Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567, 596 (1971).

The Neises, Sandys and Luginbuhl Studies, which are heavily relied on by Petitioner and Amicus NACDL, have this very flaw. The Neises Study was based on 135 registered *voters* (not *jurors* as stated in Petitioner's opening brief, p. 15, n. 2) in Fayette County, Kentucky who were interviewed by telephone. The Sandys Study involved 148 individuals who had previously served on non-capital, felony juries. The Sandys Study also employed telephone interviews. The Luginbuhl Study (Study 2, which measured jurors automatically for the death penalty) questioned 317 individuals called for jury duty in Wake County, North Carolina. None of the subjects in these three studies had been under oath and deliberated in an actual capital trial.

It is highly unlikely that those surveyed in these three studies would share the "felt responsibility" of a juror in a death penalty case. A person who is asked questions on the telephone will not give the same thoughtful responses to questions about the death penalty that he or she would give if presented with the same question sitting as a real juror, with a real defendant before them.[9]

[9] As noted in *Grigsby*, 758 F.2d at 248 n.7 (dissenting opinion):

> We will not enter into a detailed analysis of the various studies relied upon by the district court and the court today. It is enough to generally observe that an empirical study, no matter how carefully conducted, simply cannot duplicate accurately the proceedings in a courtroom under which a jury is selected and sworn to try the issues in a criminal case. The responsibilities placed on jurors in such circumstances are sobering and have a solemn impact upon them. In this situation one's responsibility is felt keenly.

Thus, in accordance with this Court's view in *Lockhart*, the Neises, Sandys and Luginbuhl Studies have little value.

The one remaining study, the Nietzel Study, did examine individuals who had actually been sworn and had deliberated in 18 capital cases. However, there is another significant methodological concern with this study. The authors of this study categorized the 242 successful defense challenges for cause into five categories: automatically for the death penalty jurors, pre-formed opinion, affiliation with victim, legal principles, and other reasons. Nietzel, *supra* at 470. The authors participated in 12 of the trials as jury consultants for the defendants and reviewed transcripts of the other six trials. The authors then, based on the responses of the voir dired juror, made personal judgments and classified the defense challenges for cause to be based on automatic death penalty beliefs. *Id.* at 472.[10]

All four cited studies contain another significant methodological limitation. None of these studies is based on representative samples. Instead, these studies derived their results from extremely small groups in a limited geographic area.

In stark contrast to the samplings in these studies, the 1981 Harris Poll interviewed 1,499 people in 100 areas

[10] This study does not specify what criteria were employed by the authors in order to place a juror's response in the automatically for the death penalty category as opposed to one of the other four categories. This study also does not indicate what types of questions these jurors were asked by the respective trial judges at the time they gave their automatically for the death penalty response. Such subjective interpretation by researchers who have actively worked as jury consultants for the defense in capital cases should be given little weight by this Court. It should be noted that the 25.8% figure in the Nietzel Study is directly refuted by the Arkansas Archival Study cited in *Grigsby*, 758 F.2d at 234-35. The Arkansas Archival Study consisted of a review of forty-one transcripts of voir dires in capital cases from 1973 to 1981 which were on file at the Arkansas Supreme Court. The Arkansas Archival Study found one-half of one percent (.5%) were automatically for the death penalty jurors. *Id.*

of the country. The Harris Poll also took into consideration variables such as region, area (rural/urban), age, sex, type of work and union membership. Joseph Kadane, *Juries Hearing Death Penalty Cases: Statistical Analysis of a Legal Procedure*, 78 J. AM. STAT. ASS'N 544, 549 (1983) (discussing Harris Poll).

The federal district court in *Grigsby* rejected a study prepared by Dr. Gerald Shure on automatically for the death penalty jurors similar to the four studies cited in this case. The *Grigsby* court determined that Dr. Shure's findings were not accurate since they were not based on a nationwide, representative sample:

> Dr. Shure did not maintain that his sample was representative. The West Los Angeles area included Bel Air, Beverly Hills, Venice, Brentwood and Westwood. And Dr. Shure acknowledged that area had recently had some highly publicized crimes; had few minorities; and was wealthy and conservative. The Harris study, on the other hand, did involve a carefully chosen representative national sample. The Court, while having the highest regard for Dr. Shure's sincerity, is convinced that he is "off the map" on his estimate of ADPs. [automatically for the death penalty]

Grigsby, 569 F. Supp. at 1307-1308.

This Court should similarly reject Petitioner's assessments of the four studies cited in the instant case because of their small size and their extremely limited geographic sampling.[11]

[11] In a footnote, Amicus NACDL cites the Luginbuhl Study for its finding that 10% of the sampled group would always vote for the death penalty for convicted first degree murderers. (Br. at 11 n.6). NACDL's brief appears to implicitly equate this finding with the percentage of automatically for the death penalty jurors found in the other cited studies. That brief fails to mention that the 10%

(Footnote continued on following page)

C. There can be no presumption that prospective jurors are automatically for the death penalty.

As an alternative to the statistics, Amicus NACDL has urged this Court to presume bias in favor of the death penalty as a matter of law. In all but the most extreme situations, however, this Court has refused to infer disqualifying juror prejudice. *See, e.g., United States v. Wood*, 299 U.S. 123 (1936) and *Dennis v. United States*, 339 U.S. 162 (1950) (refusing to presume bias of government employees summoned for jury duty); *Murphy v. Florida*, 421 U.S. 794 (1975) (persons exposed to pre-trial publicity); *Smith v. Phillips*, 455 U.S. 209 (1982) (juror who sought employment in the district attorney's office); and *Mu'Min*, 111 S. Ct. at 1917 (Kennedy, J., dissenting) (analyzing the very few cases tried in a "carnival atmosphere created by press coverage" where proof of individual bias was unnecessary). In fact, despite the fact that racial prejudice was the principal reason for creating the Fourteenth Amendment, *Ham*, 409 U.S. at 526-27, this Court has refused to indulge in a constitutional presumption of juror bias for or against members of any particular racial or ethnic groups. *Rosales-Lopez*, 451 U.S. at 190.

To the contrary, as this Court has stated, in a somewhat different context, that such jurors "will be few indeed as compared with those excluded because of scruples *against* capital punishment." *Adams v. Texas*, 448 U.S. 38, 49 (1980). "Despite the hypothetical existence of a

[11] *continued*

figure was derived from Study 1 in the Luginbuhl Study which did not even attempt to identify automatically for the death penalty jurors by the correct legal standard. Luginbuhl, *supra* note 5 at 271-72. The brief also fails to report the results from Study 2 in the Luginbuhl Study which the authors designed to identify automatically for the death penalty jurors. *Id.* at 272. The authors found that automatically for the death penalty jurors comprised only 1% of the total sample in their study. *Id.* at 274, 276.

juror who believes literally in the Biblical admonition 'an eye for an eye', (cites omitted), it is undeniable, . . . , that such jurors will be few indeed . . . ." *Id.*

Considering Petitioner's meager and inconclusive statistics, this Court should refuse to presume a bias for the death penalty.

D. Persons automatically for the death penalty will be detected by general fairness questions.

The trial court's explanation of the trial processes, general fairness questions, questions concerning the venireman's willingness and ability to find the facts and to follow the law, and the juror's oath are constitutionally adequate to uncover potential prejudice, including any bias in favor of the death penalty. *Turner*, 476 U.S. at 49 n.6 (Rehnquist, C.J., dissenting) (observing that general fairness questions can prompt a potential juror to admit bias); *Mu'Min*, 111 S. Ct. at 1919 (Kennedy, J., dissenting) (agreeing that an adequate number of fairness questions to which the venireman is required to respond can be adequate). Moreover, as this Court observed in *Dennis*, 339 U.S. at 171, an honest man trying to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind. Indeed, the fairness question was adequate in the instant case to facilitate a cause challenge. After venireman Benjamin Dexter was asked "Do you know any reason why you cannot give this defendant a fair trial?", Mr. Dexter expressed his feelings and was excused for cause. (Tr. 374)

A trial judge cannot be constitutionally required to voir dire potential jurors about every conceivable bias feared by the defendant. *Ristaino*, 424 U.S. at 595, 596 n.8. *See also Hamling v. United States*, 418 U.S. 87, 140 (1974) (no error to refuse questions concerning educational, political, and religious biases); *Connors v. United States*, 158 U.S. 408, 414-15 (1895) (political opinions and associations); *Ham*, 409 U.S. at 527-28 (prejudice against beards); *Rosales-Lopez*, 451 U.S. at 192-94 (ethnic bias against Mexicans or aliens); and *Mu'Min*, 111 S. Ct. at 1905 (content of news reports and pre-trial publicity). The facts of *Ham* are a particularly compelling example of why this Court should not encumber the Constitution by mandating voir dire questions concerning an issue that is in the limelight of current public opinion. The propriety of beards was a controversial issue in 1973 when *Ham* was decided. However, that issue has long since blown over. But if this Court had granted Ham's request of voir dire about beards, the Constitution would now require that venire members in 1992 be questioned concerning any bias they felt towards people with beards.

Thus, the Sixth and Fourteenth Amendments should not include a specific requirement that state court judges ask prospective jurors if they would be automatically *for* the death penalty, since there is no sufficiently real danger of persons with such a bias remaining undetected throughout the voir dire.

II.

VOIR DIRE, NOT EASILY THE SUBJECT OF APPELLATE REVIEW, SHOULD BE LEFT TO THE DISCRETION OF TRIAL JUDGES.

"Of necessity", the voir dire examination of potential jurors must be left to the sound discretion of trial judges. *Connors v. United States*, 158 U.S. 408 (1895); *Ham v. South Carolina*, 409 U.S. 524 (1973). There is no single, correct way to assure the impartiality of petit jurors. The Constitution lays down no particular test and there is no procedure "chained to any ancient and artificial formula." *Irvin v. Dowd*, 366 U.S. 717, 724-25 (1961).

Yet, as Justice White well stated in *Rosales-Lopez*, "Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire, the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." 451 U.S. at 188.

As stated in *Mu'Min*, 111 S. Ct. at 1903, this Court enjoys more latitude in setting standards for voir dire in federal court under its supervisory power than it has in interpreting the provision of the Fourteenth Amendment with respect to voir dire in state courts. Appropriate respect must be given the sovereign states in the formulation of their own rules of criminal procedure. *McNabb v. United States*, 318 U.S. 332, 340 (1943). The states remain free to impose a higher standard, mandate specific jury selection procedures, or prescribe voir dire questioning about specific biases as a matter of state law. *Ristaino*, 424 U.S. at 597 n.9. *See also Cupp v. Naughten*, 414 U.S. 141, 146 (1973) and *Mu'Min*, 111 S. Ct. at 1905, 1908, in which this Court noted that practices which are "helpful" or "desirable", or which represent the "wiser course" or "better view", may not be constitutionally required.

In both the state and federal courts, regulation of voir dire traditionally has been committed to the sound discretion of the trial judge. *Rosales-Lopez*, 451 U.S. at 188-89.

Citing a number of decisions, Petitioner and Amicus ACLU assert that there exists a consensus among the state jurisdictions that a defendant has the right to ask the venire whether they would automatically impose the death penalty.[12] However, this perceived consensus can-

[12] The Illinois Supreme Court has definitively held that a trial court is not required to conduct an inquiry concerning whether

(Footnote continued on following page)

not withstand scrutiny. Most of the 36 states that have a death penalty have not considered this issue at all. Eight courts (not two as claimed by Petitioner and Amicus) have held or suggested that this matter is best committed to the discretion of the trial judge, and that voir dire examination need not be conducted to detect venire persons automatically for the death penalty. *Henderson v. State*, 583 So. 2d 276, 283-84 (Ala. Crim. App. 1990), *aff'd*, *Ex Parte Henderson*, 583 So. 2d 305 (Ala. 1991); *Riley v. State*, 585 A.2d 719, 725-26 (Del. 1990); *Commonwealth v. Haynes*, 281 S.E.2d 209, 211-12 (S.C. 1981). *See also Irving v. State*, 498 So. 2d 305 (Miss. 1986) (strongly indicating such examination is within the trial judge's discretion); *State v. Rogers*, 341 S.E.2d 713, 722 (N.C. 1986); *overruled on other grounds*, *State v. Vandiver*, 364 S.E.2d 373 (N.C. 1988) (the trial court "is vested with broad discretion in controlling the extent and manner" of inquiry into this matter); *Timothy E. Morris v. Tennessee* (Tenn. Crim. App. September 11, 1985) (Lexis, States library, Tenn. file) (requiring that deference to the trial judge is appropriate when defense counsel seeks to "reverse-*Witherspoon*" a jury); and *King v. Strickland*, 714 F.2d 1481, 1495 (11th Cir. 1983) (denying habeas corpus relief although counsel was unable to ask whether prospective jurors would favor "a mandatory death penalty for certain crimes").[13]

[12] *continued*
the venire members are automatically for the death penalty, but that such a decision is within the discretion of the trial court. *People v. Jackson*, No. 68012 (Ill. Sup. Ct. September 26, 1991) (LEXIS, States library, Ill. file). Petitioner's contention, based on a reading of *Daley v. Hett*, 495 N.E.2d 513 (Ill. 1986), that the Illinois Supreme Court views a *Witherspoon* examination as a right vested solely with the prosecution, is based on an erroneous reading of Illinois Supreme Court's dicta. *Hett*, 495 N.E.2d at 516-17.

[13] Most of Petitioner's "consensus" cases are not on point. Most involve potential jurors who disclose a bias; all would agree these

(Footnote continued on following page)

Furthermore, five state cases relied upon by Petitioner do not in any way support his position. In South Carolina, contrary to Petitioner's contention, neither *Gaskins v. McKellar*, 916 F.2d 941 (4th Cir. 1990), nor *State v. Atkins*, 399 S.E.2d 760 (S.C. 1990) hold that a defendant is allowed to examine the venire for potential automatically for the death penalty jurors. In *Commonwealth v. White*, 531 A.2d 806 (Pa. 1987), a non-death penalty case, the issue was whether the trial court improperly permitted the prosecution to inform the venire about the penalty for first degree murder by asking the venire whether they had any scruples which would automatically prevent them from finding the defendant guilty, regardless of the evidence, where such a verdict would result in the maximum sentence of life imprisonment. *White*, 531 A.2d at 809. The Pennsylvania Superior Court held that the above was not error. *Id.* at 809. In *State v. McMillin*, 783 S.W.2d 82 (Mo. 1990), although the trial court refused to allow defense counsel to ask a venire member whether she would automatically vote for the death penalty, the court permitted counsel to inquire whether the venire member "could conceive of any serious case in which the death penalty might be appropriate. . . ." *Id.* at 94. The Missouri Supreme Court held that, based on the above, because the trial court permitted wide latitude for voir dire examination, the trial court's denial of the "automatically for

[13] *continued*

persons should be excused, and should not serve on a jury. *See People v. Coleman*, 759 P.2d 1260 (Cal. 1988); *Cumbo v. State*, 760 S.W.2d 251 (Tex. Cr. App. 1988); *Patterson v. Commonwealth*, 283 S.E.2d 212 (Va. 1981); *State v. Williams*, 550 A.2d 1172 (N.J. 1988—". . . , (w)e conclude that the trial court erred in failing to excuse this prospective juror for cause").

State v. Norton, 675 P.2d 577 (Utah 1983) does appear to be a case favoring Petitioner's point of view. (*See also Pickens v. State*, 730 S.W.2d 230 (Ark. 1987)).

the death penalty question" was not an abuse of discretion. *Id.* And *Bracewell v. State*, 506 So. 2d 354 (Ala. 1986), cited by both Petitioner and Amicus ACLU, has been effectively overruled by *Henderson v. State*, 583 So. 2d 276 (Ala. Crim. App. 1990), *aff'd*, *Ex Parte Henderson*, 583 So. 2d 305 (Ala. 1991).

From the foregoing, it is eminently plain that Petitioner's and Amicus ACLU's "consensus" of support among the states is found to be wanting. This case is unlike *Aldridge*, 283 U.S. at 311-13, where this Court relied on a unanimous consensus among the states. Even a weight of authority favoring Petitioner's position does not exist.

The abuse of discretion standard is particularly appropriate because a trial judge will know the community from which the venire members have come. Thus, the trial judge will be aware of any prevailing attitudes or experiences that may make the members of his community likely to be automatically for the death penalty. To assist in making this determination, the trial judge assesses a venire member's responses, inflection and demeanor to determine his impartiality. *Patton v. Yount*, 467 U.S. 1025, 1038 & n.14 (1984); *Ristaino*, 424 U.S. at 595. Because this credibility determination is peculiarly within the trial judge's province, *Witt*, 469 U.S. at 428 and *Patton*, 467 U.S. at 1039, the conduct of voir dire should always be committed to the trial judge's discretion.

Petitioner fails to offer this Court a compelling reason to remove voir dire practice from the province of the trial judge's discretion. Even the Petitioner has not suggested that a state trial judge, sworn to uphold the Constitution of his or her State as well as the Constitution of the United States, would refuse to ask any question if there were any particular reason to believe that a given venire or venire member was not inclined to follow the law.

III.

PETITIONER'S SUGGESTION THAT HE IS ENTITLED TO ASK VENIRE MEMBERS THE INVERSE OF THE *WITHERSPOON* QUESTION IS ERRONEOUS IN LIGHT OF THE *WITHERSPOON* AND *WITT* HOLDINGS, AND IN LIGHT OF MODERN DEATH PENALTY LEGISLATION.

Pointing to the fundamental fairness guarantee of the due process clause, Petitioner finally claims he is entitled to a reciprocal benefit whenever the State has chosen "to *Witherspoon* a jury." In this connection, Petitioner specifically claims the Constitution assures him a "reverse-*Witherspoon*" procedure.

Petitioner's argument rests on a fundamental misreading of *Witherspoon v. Illinois*, 391 U.S. 510 (1968). The *Witherspoon* decision did not confer a right upon the State in jury selection in capital cases. Properly read, the *Witherspoon* decision only *limited* the State's ability to excuse for cause those jurors with "scruples" against the death penalty who could never set aside their personal views to decide a case impartially. *Witherspoon*, 391 U.S. at 522 n.21 (construed in *Adams*, 448 U.S. at 47-48).

The voir dire questioning discussed in *Witherspoon* was designed to protect both parties' right to an impartial jury by excusing those persons who could not judge the case on the evidence adduced at trial and the court's instructions. *Witherspoon*, 391 U.S. at 512. To the extent that there is a *Witherspoon* parallel, it would only come after a person said "yes" to an automatic death penalty question, and would then be asked if he or she could "follow the law." "Following the law" is the antidote to any misdirected attitudes.

There is also a quantitative difference between the *Witherspoon* question and the automatically for the death

penalty question. Illinois requires a unanimous verdict in favor of imposing death. Ill. Rev. Stat. ch. 38, §9-1(g) (1985). Thus, one person unable to impose the death penalty can act to nullify the state's law authorizing the death penalty. Persons automatically for the death penalty would not carry the same weight, however, because persons automatically for the death penalty would still need to persuade the remaining eleven jurors to vote *for* the death penalty.

Moreover, there is scant room for bias to operate during a post-*Gregg* capital sentencing hearing. Unlike the statutory scheme reviewed in *Witherspoon* which conferred unfettered discretion on the factfinder, the Illinois Death Penalty Act, extensively revised in 1977, minimizes sentencing discretion to a constitutionally acceptable level. The Illinois statute narrows the class of persons eligible for the death penalty by requiring the sentencer to find one or more statutory aggravating factors. The State may then provide additional evidence in aggravation, but the sentencer must consider all relevant mitigating evidence presented by the defendant. If a jury sits to determine sentence, that jury must unanimously conclude there are no mitigating factors sufficient to preclude imposition of the death penalty. Ill. Rev. Stat. ch. 38, §9-1 (1977); Ill. Const. Art. VI, sec. 4(b). The conditions which necessitated the *Witherspoon* decision no longer exist. *Adams*, 448 U.S. at 53 (Rehnquist, J., dissenting).

Thus, neither the Constitution, nor equity, requires that venire members in capital cases be asked "the reverse" of the *Witherspoon* question.

CONCLUSION

For all the foregoing reasons, the Respondent respectfully prays that this Honorable Court affirm the decision and sentence of the Illinois Supreme Court.

Respectfully submitted,

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FOR ARGUMENT

No. 91-5118

In The

Supreme Court of the United States

October Term, 1991

DERRICK MORGAN,

Petitioner,

vs.

ILLINOIS,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Illinois

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ARGUMENT

A.

GENERAL FAIRNESS QUESTIONS ARE NO SUBSTITUTE FOR INQUIRY INTO WHETHER AN INDIVIDUAL WILL AUTOMATICALLY IMPOSE DEATH, AND A DEFENDANT'S INTEREST IN SELECTING JURORS ABLE TO CONSIDER MITIGATION JUSTIFIES A MINIMAL INTRUSION INTO THE DISCRETION OF TRIAL COURTS.

The state asserts that only racial bias is sufficiently important to warrant a Sixth Amendment requirement of inquiry during voir dire. The ability to find that a sentence other than death is appropriate is central to a capital sentencing jury's function, and merits the same protection as a defendant's right to uncover racial bias among veniremembers. Faced with a weak case, even a racist might acquit; a juror who would automatically impose death will never afford a defendant leniency, no matter how compelling the case for leniency is. The difference is that a racist is influenced by his views while serving as a juror, whereas the opinion at issue here is more than influential, it determines the ultimate issue before a sentencing juror.

This trial demonstrates the failings of discretion. The trial court refused to ask whether individuals would automatically impose death if they convicted petitioner. The court explained that "I have asked the question in a different vain (sic) substantially in that nature." (J.A. 44) It had not.

The state concedes that only nine of the twelve jurors were even asked whether they could follow the law. (Respondent's brief at p. 4) When juror Ship said that he

would not vote against the death penalty, no clarifying questions were asked even though that response might have indicated that he had misunderstood the question. A general fairness question elicited from venireman Dexter the response that he would want to see a guilty defendant hung, a response the state recognizes was ambiguous because it could have referred to petitioner or only to the individual who had murdered Dexter's friend's parents. (Respondent's brief at 11) Yet the trial court, exercising its discretion, asked no questions to clarify that response, though Dexter would seemingly have been a fit juror had he meant the latter.

The state would rely upon a trial court's discretion because it believes trial judges may be aware of prevailing community beliefs. (Respondent's brief at 25) Trial judges can share prevailing community beliefs that they may not recognize as being prejudicial. This trial court referred to petitioner's African American attorneys as "Smiley" and "Laughing Boy." (R. 1729) Regardless, community mores are not the problem. An individual's viewpoint is at issue, and taking an oath to uphold the Constitution does not improve a judge's ability to guess whether an individual will automatically impose death.

Requiring this question will have little impact on a trial court's discretion. The question need be asked only when requested by the defendant. Life qualifying a venireman will usually involve just one question. It is no more intrusive than *Witherspooning* a venire, yet respondent's concern for discretion and state's rights has not prompted it to question that procedure.

B.

DUE PROCESS CONCEPTS OF FAIRNESS REQUIRE THAT A DEFENDANT BE ABLE TO LIFE QUALIFY A VENIRE WHENEVER THE STATE DEATH QUALIFIES A VENIRE, REGARDLESS OF WHETHER THE STATE HAS A RIGHT TO DEATH QUALIFY A VENIRE.

Respondent argues that *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770 (1968), conferred no right upon the states. That allegation constitutes an abrupt departure from respondent's position in *Daley v. Hett*, 113 Ill.2d 75, 495 N.E.2d 513 (1986), where respondent vehemently argued that it had a right to death qualify jurors who would not even be involved in a capital sentencing decision.

Even though petitioner does not believe that *Witherspoon* conferred a right upon the state, there is support for the respondent's claim in *Daley v. Hett* that it did:

> McCree concedes that the State may challenge for cause prospective jurors whose opposition to the death penalty is so strong that it would prevent them from impartially determining a capital defendant's guilt or innocence. Ipso facto, the State must be given the opportunity to identify such prospective jurors by questioning them at voir dire about their views of the death penalty.
>
> *Lockhart v. McCree*, 476 U.S. 162, 90 L.Ed.2d 137, 146, n.7, 106 S.Ct. 1758 (1986).

If the state does have the right to identify those individuals, due process guarantees defendants the reverse. Even if the state has no right to identify those individuals, due process requires that the defendant be allowed

to ask the reciprocal question when a trial court exercises its discretion and allows the state to death qualify a jury.

Respondent incorrectly claims that there is scant room for bias to affect sentences imposed under current death sentencing schemes. Even if Illinois' Death Penalty Act reduces discretion to a constitutionally acceptable level, a fair jury is still required to properly exercise the substantial discretion that remains vested in the sentencer. *Turner v. Murray*, 476 U.S. 28, 90 L.Ed.2d 27, 35, 36, 106 S.Ct. 1683 (1986). "Each jury is unique in composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense." *McCleskey v. Kemp*, 481 U.S. 279, 95 L.Ed.2d 262, 279-280, 107 S.Ct. 1756 (1987).

There is little logic in the assertion that a juror who automatically would impose death is unimportant because he would not affect the sentence unless he convinced eleven other jurors to impose death. (Respondent's brief at 27) If the state's argument is applied to another circumstance, race, its absurdity shows. No one would seriously contend that a racist could serve on a jury merely because he would be only one of twelve votes needed to convict an African American defendant.

The argument that the state has a more important interest in *Witherspooning* veniremen than the defense has in asking the reverse is misguided. (Respondent's brief at 27) The legislature's decision that any individual juror can prevent a death sentence in no way lessens a defendant's interest in being tried by a fair jury. That decision

reflects the legislature's considered opinion that a death sentence should be difficult to obtain. If one person who cannot consider mitigation serves on a capital sentencing jury, the legislature's sentencing scheme is thwarted, for it is not possible for each member of that jury to prevent a death sentence.

C.

RESPONDENT'S ASSERTION THAT THERE IS NO CONSENSUS OF JUDICIAL DECISIONS SUPPORTING PETITIONER IS MISTAKEN.

Initially, the state notes that most states with a death penalty have not considered the issue. This Court has pointedly stated that a consensus need exist only in those jurisdictions having considered an issue. *Mu'Min v. Virginia*, 500 U.S. ___, 114 L.Ed.2d 493, 509, 111 S.Ct. ___ (1991) (rejecting American Bar Association jury selection standards because they have "not commended themselves to a majority of the courts that have considered the question").

The state lists a number of cases to establish that there is no consensus. The state's cases are inapposite with the exception of those from South Carolina and Delaware, jurisdictions which petitioner noted in his original brief supported respondent's position.

The state makes much of *Henderson v. State*, 583 So.2d 276, 283-284 (Ala. Crim. App. 1990), *aff'd, Ex Parte Henderson*, 583 So.2d 305 (Ala. 1991), even claiming that it overruled *Bracewell v. State*, 506 So.2d 354 (Ala. Crim. App. 1986), which plainly said a defendant is entitled to ask

whether jurors would automatically impose death. *Henderson* merely held that the issue was procedurally defaulted and did not amount to plain error. *Henderson v. State*, 583 So.2d at 283-284. *Henderson* established no substantive rule on this issue and did not overrule *Bracewell*.

The state relies upon *Irving v. State*, 498 So.2d 305 (Miss. 1986), for the proposition that the trial court should have the discretion to refuse to question jurors on this subject. *Irving* actually held that the reverse-Witherspoon question should have been asked, but that the issue had been defaulted. *Irving v. State*, 498 So.2d at 311.

In *State v. Rogers*, 341 S.E.2d 713, 722 (N.C. 1986); *overruled on other grounds, State v. Vandiver*, 364 S.E.2d 373 (N.C. 1988), the court did say that a trial court has broad discretion in conducting voir dire, but concluded that "both the State and defendant have a right to question prospective jurors about their views on the death penalty so as to insure a fair and impartial jury." *State v. Rogers*, 341 S.E.2d at 722. That case is consistent with petitioner's position.

King v. Strickland, 714 F.2d 1481, 1495 (11th Cir. 1983), does not support respondent. *King* did not hold that reverse-*Witherspooning* is improper, but that counsel was not entitled to ask a hypothetical question that did not reflect the nature of the death penalty statute. *King v. Strickland*, 714 F.2d at 1495. No misleading hypothetical is here involved.

Respondent misunderstands petitioner's position concerning *Gaskins v. McKellar*, 916 F.2d 941 (4th Cir. 1990), and *State v. Atkins*, 399 S.E.2d 760 (S.C. 1990). Far from saying that they require reverse-*Witherspooning*,

petitioner noted only that it was obvious that the trial courts in those cases allowed reverse-*Witherspooning* despite South Carolina's rule that such questioning is not necessary.

State v. McMillin, 783 S.W.2d 82 (Mo. 1990), also supports petitioner's position. That court held that refusing to ask a reverse-*Witherspoon* question was permissible, but only because other questions had revealed that information. *McMillin* succinctly explained why *Witherspooning* is allowed, and in so doing, revealed why reverse-*Witherspooning* is necessary. The court stated that death-qualifying is permitted to facilitate a determination of whether veniremen can consider the full range of punishments. *State v. McMillin*, 783 S.W.2d at 94. Reverse-*Witherspooning* serves exactly that purpose, and only when it is employed can it be determined whether veniremen can consider the full range of punishments. When only *Witherspooning* is allowed, all that can be determined is whether veniremen can consider the maximum punishment.

Commonwealth v. White, 531 A.2d 806 (Pa. Super. 1987), also supports petitioner's position, even though it was not a capital case. In *White*, the court specifically stated that *voir dire* questions concerning potential penalties were appropriate in first degree murder cases. *Commonwealth v. White*, 531 A.2d at 809. The court explained that the rule would be of particular benefit to capital defendants, who could use it to identify veniremen who would automatically impose death upon conviction. *Commonwealth v. White*, 531 A.2d at 809 n.1.

D.

THE POSSIBILITY THAT THERE ARE JURORS WHO WILL AUTOMATICALLY IMPOSE DEATH IS SUFFICIENTLY REAL TO REQUIRE VOIR DIRE INQUIRY WHEN REQUESTED BY THE DEFENDANT.

Respondent does not claim that there are no automatic death penalty jurors. All studies cited by the petitioner and respondent demonstrate the existence of such jurors.

The NACDL cited recent studies which found the incidence of automatic death penalty jurors to be between 10% and 28.6%. Two of those studies demonstrated that such individuals may not be discovered by their responses to general fairness questions, a finding that the state has ignored. The state contends that this Court should disregard the studies because of the "markedly inconsistent" results obtained. (Respondent's brief at 13) The support for that assertion is a 1981 Harris Poll and two articles written by Joseph Kadane, both of which relied on that poll. Because of the age of the Harris Poll, it does not reflect the growing number of people who now favor the death penalty. The more recent studies cited by petitioner and the NACDL which found a higher incidence of potential automatic death penalty jurors do reflect this change in attitude and represent a more accurate estimation of prevailing views.

Petitioner and other capital defendants should not be subject to the whims of the general population on this issue. All of the studies, old and new, establish the existence of these individuals at levels sufficient to present a

danger of their appearance on a capital jury with the consequent prejudice to the defendant.

The state's remaining criticisms will be briefly discussed. First, the prosecutions's criticism of the methodology of the studies where researchers did not direct their questions exclusively to sworn jurors rings hollow in light of the state's reliance on a Harris Poll. Moreover, as the state admits, the Nietzel Study, which found that 25.8% of potential jurors would automatically impose death, did in fact examine sworn jurors who had deliberated in actual capital cases. Second, the state provides no evidence that the supposed regional bias of the studies taints the results. The Harris Poll, which the state cites with approval, found no regional differences in general attitudes toward the death penalty. Kadane, Juries Hearing Death Penalty Cases: Statistical Analysis of a Legal Procedure, 78 *J. AM. STAT. ASS'N* 544, 549 (1983). Third, while the studies did not exclusively focus on the number of automatic death penalty jurors in jury populations, such an assessment was a necessary factor, and thus a key element of each study's findings. Lastly, the state claims, without explanation, that author bias against the death penalty influenced the results. (Respondent's brief at 13) In so arguing, the state fails to address how such a bias could affect purely mathematical results such as what percentage of the population responded in a particular manner, why respected researchers and authoritative sociological journals would significantly shape results for personal motives, or why potential biases of the Harris Poll and related studies do not require this Court to disregard their results. The state's conclusory and unsupported arguments miss the critical point of all of the

studies – there exist potential jurors who will automatically impose death.

The state also suggests that this Court cannot consider the findings of the studies presented by the NACDL because they were not included in the record. This Court has frequently considered studies presented by amicus curiae. *See, e.g., Stewart v. Abend*, 495 U.S. ___, 109 L.Ed.2d 184, 110 S.Ct. 1750, 1763 (1990); *Bowen v. Gilliard*, 483 U.S. 587, 616, 97 L.Ed.2d 485, 107 S.Ct. 3008 (1987). In fact, Rule 37 of the Supreme Court Rules specifically recognizes that "(a)n amicus curiae brief which brings relevant matter to the attention of the Court *that has not already been brought to its attention by the parties* is of considerable help to the Court." (emphasis added) Neither *Ciucci v. Illinois*, 356 U.S. 571, 2 L.Ed.2d 983, 78 S.Ct. 839 (1958), nor *Brown v. Board of Education*, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686 (1954), cited by the state, even consider the issue.

CONCLUSION

Wherefore, petitioner prays that the judgment of the Illinois Supreme Court be reversed and the cause be remanded with directions that petitioner receive a new sentencing hearing.

Respectfully submitted,

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No. 91-5118

In the Supreme Court of the United States

OCTOBER TERM, 1991

DERRICK MORGAN, PETITIONER,

v.

PEOPLE OF THE STATE OF ILLINOIS, RESPONDENT.

ON WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS is an organization made up of criminal defense attorneys in private practice, public defenders and law professors dedicated to the preservation of constitutional rights as well as education of its membership and the public.

Amicus agrees with petitioner that he has a constitutional right to inquire of a venire in a capital case

whether potential jurors would automatically impose the death penalty if the defendant were convicted of murder and to have such potential jurors excused for cause.

Opposing counsel has consented to the filing of this brief. A letter indicating such consent has been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Jurors who would automatically impose the death penalty for a defendant convicted of murder should not serve on a sentencing jury. To do so would deny the defendant his Sixth and Fourteenth Amendment guarantee of an impartial jury and eviscerate the logic espoused by this Court with regard to the identification and exclusion from jury service of individuals biased by their personal views on capital punishment. Recent studies reveal that individuals who would automatically impose the death penalty ("ADPs") represent a significant and identifiable portion of the potential juror pool. Moreover, the studies indicate that ADPs, similar to jurors who would survive a *Witherspoon* inquiry, are not always identified in response to basic questions about a juror's ability to act fairly or to follow the law. Even absent this statistical data, however, due process dictates that the capital defendant have the benefit of a presumption that ADPs exist, just as the Court has supported the "death qualification" of jurors with a presumption in favor of the State. Denying the capital defendant the ability to inquire whether a juror would automatically impose a death sentence upon a finding of guilt, or failing to eliminate such a juror for cause, violates the defendant's right to a fair and impartial jury.

I. IT IS FUNDAMENTALLY UNFAIR AND A DENIAL OF DUE PROCESS TO PROHIBIT INQUIRY TO DISCOVER WHETHER A POTENTIAL JUROR WILL AUTOMATICALLY IMPOSE A SENTENCE OF DEATH TO ONE CONVICTED OF A CAPITAL CRIME

A. The Presence On the Jury of a Juror Who Will Automatically Impose Death Denies a Defendant His Sixth and Fourteenth Amendment Guarantee of an Impartial Jury

"[A] State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." *Witherspoon v. Illinois*, 391 U.S. 510, 521-522 (1968). *See also Lowenfeld v. Phelps*, 484 U.S. 231, 258 (1988); *Lockhart v. McCree*, 476 U.S. 162, 179 (1986). To effectuate that doctrine, and thus protect a defendant's guarantee of an impartial jury under the Sixth and Fourteenth Amendments, this Court has recognized that a trial court must excuse for cause a juror who would automatically impose the death penalty on a defendant convicted of a capital crime. *Ross v. Oklahoma*, 487 U.S. 81, 83-85 (1988); *Stroud v. United States*, 251 U.S. 15, 20-21 (1919).

The relief sought in the instant case is consistent with, and a logical extension of the Court's ruling in *Ross*. In *Ross*, the Court considered the constitutional effect of a trial court's failure to excuse an ADP juror for cause. Because the defense attorneys in *Ross* excluded the ADP juror through use of a peremptory challenge, this Court denied the defendant's request for a new sentencing trial, finding that there was no suggestion that those who did serve were not impartial. *Ross*, 487 U.S. at 85-86. This Court made clear, however, that the

presence of an ADP juror on the jury would have violated the defendant's constitutional right to an impartial jury. *Id.* at 85.

> Had [the ADP juror] sat on the jury that ultimately sentenced petitioner to death, and had petitioner properly preserved his right to challenge the trial court's failure to remove [the ADP juror] for cause, the sentence would have to be overturned.

Id.[1]

The defendant in *Ross* had the opportunity to discover ADP jurors during voir dire. Thus, the record provided evidence that no ADP juror sat on Ross' jury. By contrast, Morgan's trial judge disallowed questioning to identify ADPs. Thus, one cannot know from review of the record in Morgan's trial how many of Morgan's jurors were ADPs.[2] As discussed

1. There has been no suggestion that the defendant in the instant case failed to preserve this issue for appeal.

2. In deciding Morgan's appeal, the Illinois Supreme Court acknowledged the dictate of *Ross* that the trial court should excuse ADP jurors for cause. *People v. Morgan*, 142 Ill. 2d 410, 469-470, 568 N.E.2d 755, 778 (1991). The Illinois court found, however, that Morgan had failed to show that any juror on his jury was partial. *Id.* The court is silent as to how Morgan could have shown bias without the opportunity to identify ADP jurors through appropriate questioning during voir dire.

Ironically, even without ADP questioning, the record contains strong evidence that the trial court seated at least one ADP juror. After Morgan's counsel had used all of his peremptory challenges, Stuart Ship, a potential juror, arguably identified himself as an ADP in response to a *Witherspoon*-inspired question.

> Q: Would you automatically vote against the death penalty no matter what the facts of the case were?
>
> A: I would not vote against it.

(R. 538). A fair interpretation of the above exchange is that Mr. Ship would vote for the death penalty no matter what the facts of the case were. Had the trial court granted the defense motion for an inquiry whether potential jurors would automatically impose the death penalty, that ambiguity could have been cured. Instead, this probable ADP juror served on Morgan's jury.

more fully below, ADPs do exist in the potential juror pool. Since the presence of an ADP juror on a jury violates a capital defendant's constitutional rights, Morgan had a constitutional right to discover the existence of such jurors during voir dire and to have them excused for cause.

B. The Exclusion Analysis Articulated in *Wainwright v. Witt* Applies Equally to Potential Jurors Who Would Automatically Impose Death to One Convicted of a Capital Crime

Where a juror's view on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath," a court may exclude the juror for cause. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)(*citing Adams v. Texas*, 448 U.S. 38 (1980)). In *Witt*, the Court recognized a legitimate interest on the part of the State in excluding jurors whose views on capital punishment would not allow them to view the proceedings impartially, finding that such jurors would frustrate the administration of a State's death penalty scheme. *Id.* at 422-423. Since the State had the obligation to show such bias, the Court condoned voir dire questioning designed to discover it.

> As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, *through questioning*, that the potential juror lacks impartiality.

Witt, 469 U.S. at 423 (emphasis added). As then-Justice Rehnquist stated, the "quest" of venire is to find "jurors who will conscientiously apply the law and find the facts." *Id.*

Capital defendants have an even more compelling right to ascertain whether potential jurors will impose a death sentence impartially. Just as the State may identify and request the exclusion of potential jurors who will not, because of personal views, vote for the death penalty, equity demands that the capital defendant have the ability to identify and request the exclusion of potential jurors who will not, because of personal views, vote against the death penalty. In both instances, the trial court only excludes those who will not apply the law.[3] By failing to ask prospective jurors whether they would impose the death penalty automatically, the trial court failed to protect Morgan's constitutional right to an impartial jury.[4]

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[3] Exclusion of ADPs, persons who by definition will not follow the law because they will never vote against the death penalty, is "logically consistent" with exclusion of persons who will not follow the law because they will never vote for the death penalty. *Adams v. Texas*, 448 U.S. 38, 54 (1980) (Rehnquist, J. dissenting). It should be noted that *Witt* gives the State the right to exclude for cause a larger group of anti-death penalty persons, including persons whose personal views would "substantially impair" their ability to vote for the death penalty. 469 U.S. at 423-424. Arguably, complete parity requires the court to allow the defense to indentify and exclude persons with strong pro-death penalty views even when such persons may not be ADPs.

[4] Even the Illinois Supreme Court, in a case decided after its denial of Morgan's appeal, admitted that allowing the defendant to inquire whether an individual would automatically impose the death penalty is the best means of assuring an impartial jury. *People v. Jackson*, 1991 WL 188831 at 31 (Ill. Sept. 26, 1991).

> We do not . . . mean to imply that the "reverse-*Witherspoon*" question is inappropriate. Indeed, given the type of scrutiny capital cases receive on review, one would think trial courts would go out of their way to afford a defendant every possible safeguard. The "reverse-*Witherspoon*" question may not be the only means of ensuring defendant an impartial jury, but it is certainly the most direct. The best way to ensure that a prospective juror would not automatically vote for the death penalty is to ask.

C. Exclusion of ADPs Effectuates the Requirement That Sentencers in Capital Cases Consider Mitigating Circumstances

A jury must consist only of "jurors who will conscientiously apply the law and find the facts." *Witt*, 469 U.S. at 423. "It is beyond dispute" that the law requires sentencers in capital cases to consider mitigating circumstances. *Mills v. Maryland*, 486 U.S. 367, 374 (1988). *See also Penry v. Lynaugh*, 492 U.S. 302 (1989)(failure to instruct the jury to give full effect to the mitigating evidence introduced at trial violates Eighth and Fourteenth Amendments); *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982)("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." (emphasis in original)); *Lockett v. Ohio*, 438 U.S. 586, 602-609 (1978)(sentencer may not be precluded from considering relevant mitigating evidence). Since jurors who will automatically impose death upon conviction will not consider mitigating evidence and, thus, not follow the law, they must be excluded.

Turner v. Murray, 476 U.S. 28 (1986), provides further instruction on this point. In *Turner*, the trial court refused to question potential jurors about racial prejudice. This Court reversed, ruling that the "qualitative difference" between death and all other punishments constitutionally requires voir dire that seeks to elicit racial prejudice in capital cases. *Id.* at 35. "[E]very capital sentencer must be free to weigh relevant mitigating evidence before deciding whether to impose the death penalty." *Id.* at 34. The risk that racial prejudice may infect the sentencing entitles a capital defendant to have the potential jurors questioned on the issue of racial bias.

> [T]he mere fact that petitioner is black and his victim white does not constitute a "special circumstance" of constitutional proportion. What sets this case apart from *Ristaino [v. Ross*, 424 U.S. 589 (1976), where Court held that voir dire inquiry into racial prejudice was not always required], however, is that in addition to petitioner's being accused of a crime against a white victim, the crime charged was a capital offense.

Id. at 33.[5]

The death penalty views of ADP jurors inhibit their ability to consider mitigating factors just as racial prejudice may inhibit such consideration. Consistent with the ruling in *Turner*, upon the request of the defendant, voir dire must include questions to identify ADP jurors, and such jurors must be excused from service because they will not follow the law.

[5] The Morgan record reflects that the trial judge did not recognize or even acknowledge the "qualitative differences" created by the capital nature of this case. During voir dire the defendant requested that the court remove for cause a juror who thought he might take a negative inference from the defendant's failure to testify. (R. 542). Defense counsel argued that the fact that the case involved the possibility of a death sentence compelled the juror's exclusion. In denying the defense request, the trial court stated:

> I don't care what kind of case this is. I try — I try the case regardless of what the nature of the charges are. My duty, as a judge, is not to base my decisions on the fact that a case is a capital case, or if it is just an ordinary shoplifting case.

(R. 542-543).

II. JUROR RESEARCH REVEALS THE PRESENCE OF AN IDENTIFIABLE AND SIGNIFICANT PORTION OF THE POPULATION WHO WOULD AUTOMATICALLY IMPOSE DEATH

Recent juror studies reveal a significant number of ADPs in the potential juror pool who can be identified through proper questioning. These studies also reveal that a court cannot reliably identify all ADP jurors merely by inquiring whether their views on the death penalty would affect their ability to perform their juror duties in accordance with the law. In one 1987 study the authors reviewed 18 capital murder trials held between 1980 and 1983 in Kentucky, South Carolina and California. Nietzel, Dillehay & Himelein, *Effects of Voir Dire Variations In Capital Trial: A Replication and Extension*, 5 Behavioral Sci. & the Law 467 (1987). They analyzed the relationship between various methods of voir dire and the sustained challenges for cause by defense and prosecuting attorneys. *Id.* at 468. Of 242 defense-inspired, for cause removals, 25.8% of the jurors were removed because questioning revealed them to be ADPs. *Id.* at 473.

In a second 1987 study, the authors asked four questions of 135 randomly selected, registered voters in Fayette County, Kentucky. Neises & Dillehay, *Death Qualification and Conviction Proneness: Witt and Witherspoon Compared*, 5 Behavioral Sci. & the Law 479 (1987). Two questions addressed the respondents' willingness to vote for the death penalty and their ability to decide fairly the question of guilt. *Id.* at 483. A third question sought to determine the respondents' attitudes toward the death penalty and whether the strength of those attitudes "would seriously affect their ability to perform their duties" as jurors. *Id.* A final question asked whether respondents "would always vote to impose the death penalty for guilty capital defendants." *Id.*

Based on the responses to these questions, the authors calculated that 76.9% of the respondents favored the death penalty while only 22.4% opposed it. *Id.* at 485. Almost one-fourth of the tested population, 32 of the 135 respondents, identified themselves as ADPs. *Id.* at 485-486. Perhaps the most significant finding, however, was that 26 of the 32 ADPs also said that they "would not be substantially impaired or prevented from performing their juror duties despite having also stated that they would always vote for the death penalty for guilty capital defendants." *Id.* at 493. Thus, as the authors concluded, "at least some potential jurors are not aware that failure to consider all punishment options in the penalty phase of the trial is a violation of the juror duties they are expected to perform." *Id.* at 492.

A third study reported the results of a survey of randomly selected persons who had recently served as jurors in non-capital felony cases. Sandys & Dillehay (1987, April). *Juror Qualification Under the New Wainwright v. Witt Standard: A Test of Jurors' Ability To Anticipate Their Role* (paper presented at the meetings of the Southeastern Psychological Association, Atlanta, Ga.). Respondents were classified as "includable" or "excludable" based on their response to the question, derived from *Witt:* "Is your attitude toward the death penalty so strong that it would seriously affect you as a juror and interfere with your ability to perform your duties?" *Id.* at 4. Only sixteen of the respondents were "excludable" based on their response to that question. *Id.* at 7. Further questioning revealed, however, that "28.6% (42) of the *Witt* includables indicated that they would always give

the death penalty for capital murder, regardless of the evidence." *Id.*[6]

This research demonstrates that a more direct questioning scheme than the trial court allowed in this case is required to identity potential jurors who would automatically impose a death sentence. Without the ability to inquire whether a juror will automatically impose death, the capital defendant is denied his constitutional right to an impartial jury.

III. CAPITAL DEFENDANTS ARE ENTITLED TO A PRESUMPTION THAT SOME POTENTIAL JURORS WILL BE ADPs

Although the above-cited studies provide compelling evidence that ADPs make up a significant portion of potential jurors, this Court need not rely solely on these statistics to reverse Morgan's sentence.[7] In *Witt*, the Court did not require a statistical showing that people whose views on capital

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[6] Two juror studies, reported together in 1988, found lower but still significant percentages of ADPs in their sampled populations. Luginbuhl & Middendorf, *Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials*, 12 L. and Hum. Behav. 263 (1988). After conducting two surveys of North Carolina jurors, the authors found that 10% of the sampled populations (31 of 325 in Study 1 and 31 of 317 in Study 2) responded that they would always invoke the death penalty for convicted first degree murderers. *Id.* at 270, 273. Even when the authors incorporated this death penalty inquiry into a question about the respondent's ability to follow the judge's instructions, four of the 31 jurors who had said they would always invoke the death penalty continued to express ADP views. *Id.* at 274. Two early studies, which counsel were unable to obtain, appear to indicate a lower but still identifiable percentage of ADPs in the population. Louis Harris & Associates, Inc., Study No. 814002 (1981) (1%); Young, Andrea, Arkansas Archival Study (1981) (.5%).

[7] In *Ross*, the Court recognized that a death sentence must be overturned if a single ADP juror sat on the jury. *Ross*, 487 U.S. at 85.

punishment would substantially impair or automatically preclude their ability to impose a death sentence represented a significant portion of the population. The Court was apparently willing to presume that such potential jurors existed and to accord the State the benefit of that presumption. Capital defendants are entitled to the analogous presumption, *i.e.*, that ADP jurors exist in the potential juror population.

The Court also was not concerned with statistical studies in *Turner v. Murray*, 476 U.S. 28 (1986), where it held that the trial court must ask potential jurors in capital cases about racial bias. Although the Florida Supreme Court had rejected the statistical evidence presented by the defendant, this Court presumed the possibility of juror bias. *Id.* at 37 n.11. "We find it unnecessary to evaluate statistical studies which petitioner has introduced in support of the proposition that black defendants who kill whites are executed with disproportionate frequency." *Id.* The Court's presumption of impact stemmed, at least in part, from "the special seriousness of the risk of improper sentencing in a capital case." *Id.* at 37.

> [T]he risk that racial prejudice may have infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized.

Id. at 36.

Just as the Court was willing to presume the existence of jurors who, because of racial prejudice, would be biased, the Court should presume the existence of ADP jurors. The risk of juror bias caused by the presence of an ADP juror on a capital jury is "unacceptable in light of the ease with which that risk could have been minimized." *Id.* Accordingly, Morgan's sentence must be vacated.

CONCLUSION

For the reasons set forth, *amicus* urges this Court to reverse the judgment of the Illinois Supreme Court and to vacate the sentence.

Respectfully submitted,

National Association of
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No. 91-5118

In The Supreme Court of the United States October Term, 1991

DERRICK MORGAN,

Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

ON APPEAL FROM THE ILLINOIS SUPREME COURT

BRIEF OF AMICI CURIAE THE AMERICAN CIVIL LIBERTIES UNION THE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS IN SUPPORT OF APPELLANT

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INTEREST OF AMICI CURIAE*

The American Civil Liberties Union is a nationwide, nonpartisan organization with nearly 300,000 members. The ACLU of Illinois is one of its state affiliates. Amici are dedicated to the principles embodied in the Bill of Rights including the ban on cruel and unusual punishment and the guarantee of due process of law in criminal proceedings. Because of the irreversibility of the death penalty, the government's duty to provide fair procedures, including an impartial jury, is preeminent in capital cases. Reflecting its longstanding concerns with the death penalty, the ACLU created a Capital Punishment Project in 1975 to work exclusively on death penalty issues and to ensure, at

* Pursuant to United States Supreme Court Rule 37.3, the ACLU and the ACLU of Illinois have obtained the written consents of all parties, which accompany this brief.

the very least, that procedures for imposing the death penalty are fair and evenhanded. The ACLU has participated in numerous death penalty and jury selection cases before this Court, including *Witherspoon v. Illinois*, 391 U.S. 510 (1968) and *Batson v. Kentucky*, 476 U.S. 79 (1986).

SUMMARY OF THE ARGUMENT

In this capital case, the Illinois Supreme Court upheld the trial court's refusal to question defendant Derrick Morgan's jury to determine whether any of its members would automatically sentence him to death, upon a finding of guilt, regardless of instructions by the Court. In upholding the trial court's ruling, the Illinois Supreme Court denied Derrick Morgan a fair trial by foreclosing any meaningful opportunity to protect his Sixth Amendment right to an impartial jury. The opportunity to protect substantive rights is at the core of our principles of ordered liberty. Here, however, the Illinois Supreme Court denied due process of law in its primary sense — process which provides the opportunity to protect a fundamental constitutional right.

In *Ross v. Oklahoma*, 487 U.S. 81 (1988), this Court established that a defendant in a capital case has the right to a jury panel free from members who would automatically impose a sentence of death. Although Derrick Morgan had this right, the only way he could enforce it was to have his attorney or the court question the jurors on this issue. In this case, Derrick Morgan's counsel attempted to protect this right. He proposed that the trial court ask prospective jurors: "If you found Derrick Morgan guilty would you automatically vote to impose the death penalty no matter what the facts are?" *People v. Morgan*, 568 N.E.2d 755, 778 (Ill. 1991). However, the trial court refused to make that inquiry.

On direct appeal from his conviction, Derrick Morgan asserted that he had been denied an impartial jury on this precise ground. In an alarming denial of procedural fairness, the Illinois Supreme Court rejected the appeal. The Illinois Supreme Court upheld the refusal to permit questioning, while at the same time ruling that Derrick Morgan had made no showing that any actual juror would automatically impose the death penalty. *Id.* The practical effect of this decision was to hold that Derrick Morgan had a constitutional right with no means to exercise it.

Thus, the decision of the Illinois Supreme Court paid lip service to the right to a jury composed of jurors who will not

automatically impose the death penalty, while rendering that constitutional right an empty promise. The Illinois Supreme Court placed on Derrick Morgan a burden of proof that the trial court prevented him from meeting. This Kafkaesque interpretation of the Sixth Amendment cannot be condoned.

The Illinois Supreme Court's decision is particularly unjust in this capital case, the quintessential case in which maximum process is due. Derrick Morgan's life cannot be taken by the State of Illinois until and unless he is afforded the right to seek a jury panel free from members who would automatically impose a sentence of death.

ARGUMENT

I.

MORGAN HAS A RIGHT TO A TRIAL BY JURORS WHO WOULD NOT AUTOMATICALLY SENTENCE HIM TO DEATH UPON A FINDING OF GUILT.

During the *voir dire* in *Ross v. Oklahoma*, a prospective juror named Darrell Huling "declared that if the jury found petitioner guilty, he would vote to impose death automatically." *Ross v. Oklahoma*, 487 U.S. at 84. Defense counsel moved to have Huling removed for cause, and when the trial court denied that motion, the defense exercised a peremptory challenge to remove Huling. On appeal before this Court, the defendant contended that the trial court's failure to remove Huling for cause violated the Sixth and Fourteenth Amendments. The defendant's conviction was upheld only because Huling did not sit on the jury.

Chief Justice Rehnquist expressed the view of the Court that an automatic death penalty juror such as Huling cannot sit on a capital sentencing jury, for "the sentence would have to be overturned." *Id.* at 85. As Chief Justice Rehnquist specifically stated:

> Had Huling sat on the jury that ultimately sentenced petitioner to death, and had petitioner properly preserved his right to challenge the trial court's failure to remove Huling for cause, the sentence would have to be overturned.

Id. As Chief Justice Rehnquist explained, "[i]t is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury." *Id.*

This Court's decision in *Ross v. Oklahoma* is consistent with an established line of cases holding that the Constitution protects capital defendants from jurors whose views on capital punishment would prevent them from conscientiously applying the law and finding the facts. In *Adams v. Texas*, 448 U.S. 38, 45 (1980), and again in *Wainwright v. Witt*, 469 U.S. 412, 424 (1985), this Court recognized that a prospective juror whose views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" may be excluded for cause. *See also Lockett v. Ohio*, 438 U.S. 586, 595-96 (1978) (excluding jurors whose views on capital punishment would prevent them from abiding by the law and following the instructions of the trial judge).

An automatic death penalty juror is by definition one who cannot perform his duties in accordance with his instructions and his oath; an automatic death penalty juror would sentence a defendant to death regardless of the law or the facts. Under *Ross v. Oklahoma*, the Sixth Amendment right to an unbiased jury means that no juror in a capital case can be an automatic death penalty juror.[1]

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[1] Indeed, no state court has held that defendants may be denied their right to a jury free from jurors who would automatically impose death upon a finding of guilt. To the contrary, every state that has considered the issue has recognized a defendant's right to exclude prospective jurors whose bias toward the death penalty would prevent them from observing their oaths. *See Bracewell v. State*, 506 So.2d 354, 358 (Ala. Crim. App. 1986); *Pickens v. State*, 730 S.W.2d 230, 234 (Ark.), *cert. denied*, 484 U.S. 917 (1987); *People v. Coleman*, 759 P.2d 1260, 1270 (Cal. 1988), *cert. denied*, 489 U.S. 110 (1989), *post conviction relief granted*, 771 F. Supp. 300 (N.D. Cal. 1991); *DeShields v. State*, 534 A.2d 630, 634-36 (Del. 1987), *cert. denied*, 486 U.S. 1017 (1988); *O'Connell v. State*, 480 So.2d 1284, 1287 (Fla. 1985); *Skipper v. State*, 364 S.E.2d 835, 839 (Ga. 1988); *Morris v. Commonwealth*, 766 S.W.2d 58, 60 (Ky. 1989); *State v. Albert*, 414 So.2d 680, 682 (La. 1982); *Hunt v. State*, 583 A.2d 218, 231 (Md. Ct. App. 1990); *Kenley v. State*, 759 S.W.2d 340, 352 (Mo. Ct. App.1988); *Thompson v. State*, 721 P.2d 1290, 1291 (Nev. 1986); *State v. Williams*, 550 A.2d 1172, 1182-83 (N.J. 1988); *State v. Quick*, 405 S.E.2d 179, 190 (N.C. 1991); *State v. Tyler*, 553 N.E.2d 576, 587 (Ohio), *cert. denied*, 111 S. Ct. 371 (1990); *Boltz v. State*, 806 P.2d 1117, 1122 (Okla.), *cert. denied*, 112 S. Ct. 143 (1991); *State v. Wagner*, 752 P.2d 1136, 1174 (Or. 1988), *cert. granted and judgment vacated on other grounds*, 492 U.S. 914 (1989); *State v. Bell*, 393 S.E.2d 364, 368 (S.C.), *cert. denied*, 111 S. Ct. 227 (1990); *State v. Bates*, 804 S.W.2d 868, 878 (Tenn.), *cert. denied*, 112 S. Ct. 131 (1991); *Cumbo v. State*, 760 S.W.2d 251, 256 (Tex. Crim. 1988); *State v. Norton*, 675 P.2d 577, 589 (Utah 1983), *cert. denied*, 466 U.S. 942 (1984); *Patterson v. Commonwealth*, 283 S.E.2d 212, 216 (Va. 1981); and *State v. Hughes*, 721 P.2d 902, 905 (Wash. 1986).

II.

THE SIXTH AND FOURTEENTH AMENDMENTS REQUIRE THAT MORGAN BE AFFORDED PROCEDURAL FAIRNESS AND AN OPPORTUNITY TO DEFEND HIS RIGHTS TO AN IMPARTIAL JURY.

Derrick Morgan sought to invoke his right to an impartial jury when his counsel proposed that the trial court ask prospective jurors if they would automatically sentence him to death if he were found guilty. However, the trial court and ultimately the Illinois Supreme Court denied him that right and thereby violated his constitutional rights to procedural fairness and due process of law.

At the very least, the Sixth and Fourteenth Amendments ensure every accused person a fair trial and an opportunity to exercise his rights. When a state court's procedures foreclose any opportunity to enforce a right, the state renders that right a nullity and violates due process of law. *See, e.g., Lankford v. Idaho*, ___ U.S. ___, 111 S. Ct. 1723, 1733 (1991); *Reece v. Georgia*, 350 U.S. 85, 89-90 (1955); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678, 682 (1930).

A. This Court Has Long Recognized that Due Process of Law Guarantees Procedural Fairness at Trial.

In 1915, Justice Holmes recognized that procedural fairness at trial is the essence of the constitutional guarantee of due process of law: "Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard." *Frank v. Mangum*, 237 U.S. 309, 347 (1915) (Holmes, J., dissenting).

Later opinions of the Court reiterate Holmes' view that, at the very least, due process of law must ensure procedural fairness at trial. *See, e.g., Shaughnessy v. Mezei*, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting) ("Procedural fairness, if not all that originally was meant by due process of law, is at least what it uncompromisingly requires."); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring) ("Fairness of procedure is 'due process in the primary sense'.") (quoting *Brinkerhoff-Faris*, 281 U.S. at 681).

Procedural fairness is entwined in the development and history of our liberty. Justices Brandeis and Frankfurter eloquently explained that liberty consists of procedural regularity and procedural safeguards: " [I]n the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play." *Burdeau v. McDowell*, 256 U.S. 465, 477 (1921) (Brandeis, J., dissenting). *See also McNabb v. United States*, 318 U.S. 332, 347 (1943) (Frankfurter, J.) ("The history of liberty has largely been the history of observance of procedural safeguards.").

The Illinois Supreme Court disregarded these principles and denied Derrick Morgan basic procedural fairness. Its decision offends any sense of fair play. The Illinois Supreme Court held that Derrick Morgan had to show that a juror was actually biased, noting that "no juror expressed any views that would call his or her impartiality into question." *Morgan*, 568 N.E.2d at 778. At the same time, and inconsistently, the Court upheld the trial court's refusal to permit Derrick Morgan's attorney to make the inquiry necessary to establish bias.

This is more than a procedural glitch. The need to question a prospective juror on his views on the death penalty is demonstrated by the facts in *Ross v. Oklahoma*, where the juror Huling "initially indicated that he could vote to recommend a life sentence if the circumstances were appropriate." It was only "on further examination of defense counsel . . . [that] he [indicated] he would vote to impose death automatically." *Ross v. Oklahoma*, 487 U.S. at 83-84; *see also Wainwright v. Witt*, 469 U.S. at 425-26 (many jurors come to court unsure of their views; hence the need for inquiry).

Nevertheless, the State claims that Derrick Morgan's right to an impartial jury was satisfied because each juror swore to uphold the law. As *Ross v. Oklahoma* demonstrates, the juror's oath alone is not sufficient, just as a witness' oath alone is not sufficient. A witness must be subject to cross-examination and a prospective juror must be subject to questioning.

Moreover, the State's assertion that a general fairness inquiry is sufficient is directly contradicted by the State's exercise of the right to question the jury on this very topic. The State itself asked prospective jurors in this case specific questions about their views on the death penalty, and struck from the panel each juror

who was so opposed to the death penalty that he could not impose that sentence under any circumstances. The State cannot now legitimately claim that specific questioning was not necessary to assure Derrick Morgan an impartial jury.

By dismissing Derrick Morgan's appeal only because he failed to show certain facts — while at the same time upholding the ruling that prevented him from establishing those facts — the decision below defies basic notions of fairness. Many state courts have recognized that a defendant's right to a jury free from automatic death penalty jurors is meaningless unless he can ask prospective jurors if they are so biased. *People v. Bittaker*, 774 P.2d 659, 679 (Cal. 1989) ("In order to intelligently exercise the right to challenge for cause, defendant's counsel must be accorded a reasonable opportunity to lay a foundation for the challenge by questioning the prospective jurors on *voir dire* to learn whether any entertain a fixed opinion [in favor of the death penalty in all circumstances]" (citation omitted)), *cert. denied*, 110 S. Ct. 2632 (1990); *Skipper v. State*, 364 S.E.2d 835, 839 (Ga. 1988) (the trial court's improper limitation on *voir dire* "deprived the defendant of an opportunity to determine whether prospective jurors were impartial on the question of sentence"); *State v. Wilson*, 330 S.E.2d 450, 458 (N.C. 1985) ("[B]oth the defendant and the State have the right to question prospective jurors as to their views concerning capital punishment in order to ensure a fair and impartial verdict."); *Patterson v. Commonwealth*, 283 S.E.2d 212, 216 (Va. 1981) (by failing to ask potential jurors whether they believed the death penalty was a proper sentence in every murder case, the trial court "failed . . . to preserve fully the defendant's right to a fair and impartial jury").[2]

The Illinois Supreme Court deprived Derrick Morgan of procedural fairness and violated his Sixth and Fourteenth Amendment rights to a fair trial and due process of law.

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[2] *Accord Morris v. Commonwealth*, 766 S.W.2d 58, 60 (Ky. 1989); *State v. Williams*, 550 A.2d 1172, 1184 (N.J. 1988); *Bracewell v. State*, 506 So.2d 354, 358 (Ala. Crim. App. 1986); *Gore v. State*, 475 So.2d 1205, 1207 (Fla. 1985), *cert. denied*, 475 U.S. 1031 (1986); *State v. Norton*, 675 P.2d 577, 589 (Utah 1983), *cert. denied*, 466 U.S. 942 (1984). *Contra Riley v. State*, 585 A.2d 719, 725-26 (Del. 1990), *cert. denied*, 111 S. Ct. 2840 (1991); *State v. Hyman*, 281 S.E.2d 209, 211 (S.C. 1981), *cert. denied*, 458 U.S. 1122 (1982).

B. A State Court May Not Deprive a Defendant of an Opportunity to Defend His Rights.

By depriving Derrick Morgan of any means to preserve or exercise his right to a jury free of automatic death penalty jurors, the Illinois Courts denied him due process of law. No state court may deny an individual an opportunity to defend his constitutional rights. *Reece v. Georgia*, 350 U.S. at 89 (due process violated where defendant had no chance to exercise his right to object to a grand jury — "the right to object to a grand jury presupposes an opportunity to exercise that right"); *In re Oliver*, 333 U.S. 257 (1948) (plaintiff was denied an opportunity to be heard, in violation of his due process rights, when Michigan judge summarily sent him to jail after questioning him in chambers).

Justice Brandeis' opinion for the Court in *Brinkerhoff-Faris Trust & Sav. Co. v. Hill* is especially instructive. In that case, the Missouri Supreme Court dismissed plaintiff's equity case because the plaintiff purportedly had an adequate legal remedy before the state tax commission. However, six years earlier the Missouri Court had ruled that the state tax commission was without power to hear an identical case. The plaintiff sought relief before this Court. The issue was whether the plaintiff had been accorded "due process in the primary sense — whether it has had an opportunity to present its case and be heard in its support." *Brinkerhoff-Faris*, 281 U.S. at 681.

This Court found that the plaintiff had not been accorded due process because the Missouri Supreme Court's decision left the plaintiff with no means to exercise its rights — citing only an administrative remedy which had never in fact been available. *Id.* In powerful language that directly applies to Derrick Morgan's case, Justice Brandeis concluded that no state may deprive a person "of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Id.* at 682.

The Illinois Supreme Court improperly deprived Derrick Morgan of any real opportunity to protect his right to a jury free of partial jurors, a right established by this Court in *Ross v. Oklahoma*. Derrick Morgan never had a chance to exercise this right before trial, and was unable to preserve his challenge to the jury's partiality for appeal. He is now entitled to a fair trial, in which that right can be exercised.

C. The Constitutional Guarantees of Procedural Fairness and an Opportunity to Defend Constitutional Rights Are of Particularly Critical Importance in a Capital Case.

The Illinois Supreme Court's judgment depriving Derrick Morgan of procedural fairness occurred when his life was at stake — when the utmost fairness was due. This Court has emphasized that the fair procedure guaranteed by the Fourteenth Amendment is crucial in capital cases. In *Lankford v. Idaho*, ___ U.S. ___, 111 S. Ct. 1723, 1732 (1991), the Court spoke of the "special importance of fair procedure in the capital sentencing context." Indeed, this Court has recognized more than once the " 'vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason . . . .' " *Id.* (quoting *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977)).

The decision of the Illinois Supreme Court does not meet the special test this Court imposes in capital cases. It cannot be said that the jury's decision to impose the death penalty was clearly an unbiased decision. Nor can it be said that the Illinois Supreme Court's decision was reasoned when its practical effect was to deny Derrick Morgan an opportunity to defend his right to an impartial jury.

Indeed, the Illinois Supreme Court has itself recognized the illogic of its decision. In *People v. Jackson*, 91-68012, slip op. at 31 (Ill. Sept. 26, 1991), while the Illinois Supreme Court affirmed its decision in *Morgan*, it recognized that the "best way to ensure that a prospective juror would not automatically vote for the death penalty is to ask," apparently leaving this matter to the discretion of the trial judge. However, protection of constitutional rights is not discretionary, particularly in capital cases.

CONCLUSION

The Illinois Supreme Court's judgment denied Derrick Morgan a fair trial and due process of law at its most basic level. In this capital case, Derrick Morgan had no opportunity to exercise or preserve his right to an impartial jury. The denial of any means to protect a constitutional right combined with the illogic of the Illinois Supreme Court's decision undermined the basic fairness of the procedure that resulted in the maximum legal penalty, the death sentence. The Court should reverse the decision of the Illinois Supreme Court.

Respectfully submitted,

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November 27, 1991